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In two very recent cases the United States Supreme Court has been called upon to determine the validity of State enactments regulating the sale and transportation of intoxicating liquors. In Rhodes v. State of Iowa, it was held, reversing the lower court, that the Act of Congress, Aug. 8th, 1890, providing that intoxicating liquors transported into any State, or remaining therein "for use, consumption, sale or storage therein shall, upon arrival in such State," be subject to the operation of its laws enacted in the exercise of its police powers, attaches to the subject of an interstate shipment only after such shipment has been consummated by the arrival of the goods at their destination and their delivery to the consignee, and a State law which makes a carrier liable to a penalty for transporting such goods within the State before their delivery, except in cases where a certificate has been obtained from State authorities (McClain's Code Iowa, § 2410), is an attempted regulation of interstate commerce, and void. Such statute, says Mr. Justice White, who delivered the opinion, if given effect, would be extraterritorial in its operation, and would interfere with commercial dealings between residents of different States, which it is the fundamental purpose of the interstate commerce provision of the constitution to exempt from State control, at least without the express sanction of congress. Mr. Justices Gray, Harlan and Brown dissented from the conclusion of the court in an exhaustive and vigorous opinion, written by Mr. Justice Gray.

The other case is Vance v. W. A. Vandercook Co., which involved the South Carolina dispensary liquor law. It was held in an opinion, also written by Mr. Justice White, that Act Congress Aug. 8th, 1890, having made intoxicating liquors an exception to the settled rule that the constitutional right to transport an article of commerce from one State into another carries with it, as an incident, the right of the receiver to sell such article in the original packages, regardless of the laws of the State, by providing that such liquors, when transported into a State, shall, upon their arrival, be subject to the laws of such State enacted in the exercise of its police powers, a State may lawfully prohibit or regulate the sale of such liquors even in the original package; that a State law prohibiting the sale of liquors by others, though, by authorizing and providing for the establishment of dispensaries for their sale by agents of the State, it recognizes such liquors as the subject of legitimate commerce, is a regulation of their sale, which is a proper exercise of the police powers of the State; that the provision of the dispensary law of South Carolina giving to the State officers exclusive right to purchase all the liquor to be sold in the State, thereby vesting in them the power to restrict sales in the State to the products of one or more States, to the exclusion of the products of other States, does not create or authorize a discrimination which unlawfully interferes with interstate commerce, since every resident of the State has the right, which cannot be affected by State legislation, to purchase from a non-resident liquors which are the product of any State, and to have the same transported into the State for his own use; that the provisions of a previous law which have been held unconstitutional cannot be considered as a part of a law subsequently enacted from which they are omitted, merely because they are not inconsistent with its provisions, and its repealing clause repeals any laws inconsistent therewith; that the fact that a law omits provisions of a former law relating to the same subject which have been declared unconstitutional negatives an intention to make them a part of the new law; that the provision of the South Carolina dispensary law which authorizes the use by a non-resident of the State of wine or liquors made by him for such purpose is not discrimination against the products of other States, which interferes with interstate commerce, such liquors being subject to all restrictions as to sales imposed on other liquors; that the requirement of such law that a resident of the State intending to have shipped into the State from another State or foreign country any liquors for his own use shall first certify such intention to the State chemist, who shall be furnished by the proposed consignor with a sample of such liquors to be tested, and, if satisfied of their purity, shall issue to such consignor a certificate authorizing the ship-

ment, and providing that any liquor transported into the State without such a certificate attached to the package shall be seized and confiscated, is in conflict with the constitution of the United States, and void, as being a substantial interference with and hampering of interstate commerce by the State, and that such requirement cannot be sustained on the ground that it is merely an exercise of the right of inspection, and so a valid police regulation; since, if the right of the State to require inspection of goods not to be offered for sale within the State exists (which is not decided), no actual inspection of the liquors shipped is provided for.

NOTES OF IMPORTANT DECISIONS.

NEGLIGENCE—ACCIDENTAL FIRE—ORIGIN.—In the case of Lillibridge v. McCann, 75 N. W. Rep. 288, decided by the Supreme Court of Michigan, it was held that one who negligently sets fire to his own premises is responsible to an adjoining proprietor to whose property the fire is communicated, as the proximate result of such negligence. The court says in part: "The meritorious question is, was the defendant liable for the consequences of the fire spreading from his own building to that of the plaintiff, if the fire in defendant's building be found to have originated in consequence of his negligence? In the absence of an intervening cause, it seems to us clear that the bare fact that the defendant may have suffered a loss of his own property through the same negligent act does not render him any the less liable to the plaintiff for a loss ensuing to him through that neglect. Whatever may have at one time been held under the statute (6 Anne, ch. 31, § 6) which provides that no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin, that statute is not applicable here. The subsequent statute (14 Geo. III., ch. 78, § 86), which enlarges the statute of Anne, had received no judicial construction prior to the Revolution. Since then, however, it has been construed in Filliter v. Phippard, 11 Q. B. 347, and it is held not to include fires set or induced by negligence. See, also, Smith, Lead. Cas. 477; Ray, Neg. Imp. Dut. 641; Shear. & R. Neg. § 665; McNally v. Colwell, 91 Mich. 532, 52 N. W. Rep. 70. Was the defendant's negligence the proximate cause of the injury to the plaintiff? The question is not different than it would be if the building first fired through the defendant's negligence had belonged to a third person or the plaintiff. The question is whether the owner of a building taking fire from another building, which is set on fire through the negligence of another, has an action against that other for the injury. This question has received consideration by this court. In Hoyt v. Jeffers, 30 Mich. 199, Mr. Justice Christiancy, speaking for the court, said: 'If such other buildings are satisfactorily shown to have actually burned by the fire of the Sherman house, caused by the negligence of the defendant, and especially if this was, under the circumstances, the natural and probable, as well as the actual, result of the fire so caused, and without any contributory negligence of the plaintiff, I can see no sound principle which can make the defendant's liability turn upon the question whether the buildings thus burned by the fire of the first were five, six, or fifty feet, or the one-hundredth part of an inch from it. And though a building thus burned by the fire of the first might be at such a distance that its taking fire from the first might not, a *priori*, have seemed possible, yet if it be satisfactorily shown that it did in fact thus take fire, without any negligence of the owner, and without the fault of some third party, which could properly be recognized as the proximate cause, and for which he could be held liable, the principle of justice or sound logic, if there be any, is very obscure, which can exempt the party through whose negligence the first building was burned from equal liability for the burning of the second. If it be said that this extent of liability might prove ruinous to the party through whose negligence the buildings were burned, it may be said, in reply, that, under such circumstances, it is better, and more in accordance with the relative rights of others, that he should be ruined by his negligence than that he should be allowed to ruin others who are innocent of all negligence or wrong.' See, also, Cooley, Torts, 701; Railroad Co. v. Salmon, 39 N. J. Law, 299; Perley v. Railroad Co., 98 Mass. 414; Railway Co. v. Kellogg, 94 U. S. 469.

Was the wind an intervening cause? The evidence tends to show that it was an existing condition at the very time the negligent act occurred, and did not constitute an intervening efficient cause. The fact that the consequences of the defendant's negligent act were more serious than would have followed under other more favorable conditions of the atmosphere does not relieve the defendant. Hoyt v. Jeffers, *supra;* Shear. & R. Neg. § 30; Fent v. Railway Co., 59 Ill. 349; Perley v. Railroad Co., 98 Mass. 414.

WATERS — NAVIGABLE WATERS — DRIVING LOGS—INJURY TO RIPARIAN OWNERS.—In Coyne v. Mississippi & R. R. Boom Co., 75 N. W. Rep. 748, decided by the Supreme Court of Minnesota, it was held that the right of passage on a navigable stream is a common and paramount one, but must be exercised with due regard to the rights of riparian owners, and with ordinary care and skill. Floating logs in such a stream may cause damage to the estate of such owners; but, if driven in an ordinarily careful, prudent manner, the court holds that the party driving is not liable for damages which may result to the riparian owners.

The court said in part: "The defendant is a corporation duly organized and acting under the provisions of Sp. Laws Minn. 1857, ch. 60, and several amendatory acts. Its power and authority to build and construct piling, piers and booms in the river mentioned—a navigable stream—and its right to handle and drive logs, under its franchise, stand conceded. It was exercising a lawful privilege when it erected piling and piers and maintained its booms at the point in question, but it was bound to exercise this privilege with due regard to the concurrent rights of riparian owners, above and below, to the use of their lands. And, as before noticed, the cause of action set forth in the complaint was based upon an allegation of defendant's negligence in the management and operation of its work above plaintiff's farm. A part of the evidence was directed toward establishing that a great quantity of logs and ice gathered at defendant's piling, piers and booms, causing a jam, and then broke loose, rushing down in a mass, and tearing and washing out more or less of the soil along the shores of the stream where it flowed through the farm; and a part was produced for the purpose of showing that defendant was careless and negligent in the management and operation of its booms, and carelessly and negligently allowed the jam to form, and then to break; and the court charged the jury upon this branch of the case. But it went further, and charged, in substance, that if the tearing and washing away of the soil along the shores were caused by the obstructions placed in the river by defendant, and this result might have been foreseen by an ordinarily prudent man, this constituted a taking of plaintiff's property, within the meaning of the law, for which defendant would be liable, without regard to its negligence or carelessness in maintaining or operating its works. To this part of the charge defendant's counsel duly excepted. We infer that the court relied upon the case of Weaver v. Boom Co., 28 Minn. 534, 11 N. W. Rep. 114, when using this language. But the facts are not at all similar, for in that case it appeared that the company built its piers and hung its booms on Weaver's land, and directly invaded and appropriated it, not only by those acts but by flooding with water, and casting quantities of logs and drift thereon, which remaining when the water subsided, destroyed the usefulness of the land. It was with reference to these facts that it was held that there had been a taking of plaintiff's property by defendant, for which compensation could be recovered. It was not a mere consequential injury to plaintiff's land which was under consideration in the Weaver case, but a physical invasion and appropriation by a defendant who was not exercising a legal right when so doing. The authority relied on is not in point. The defendant, in the exercise of its corporate franchise, and to facilitate its authorized work of handling and driving logs in a navigable river, constructed its piling and piers, and then hung booms—one extending from an island on the east side of the main channel to the east shore; the other, from an island on the west side of said channel to the west shore; leaving the main channel, between the two islands, unobstructed. Logs were pocketed in both of these booms, but the latter did not give way, nor did the logs escape. The injuries complained of resulted from the jam which formed in the channel between the islands while defendant was lawfully handling and driving the logs from above. As the river was a navigable stream, the public, as well as defendant, under its charter, had the right to use it as a highway for the floating or driving of logs; and the rights of riparian owners were subordinate to this use, if reasonably exercised. Doucette v. Navigation Co. (Minn.), 73 N. W. Rep. 847. The doctrine stated in 1 Hil. Torts, p. 103, thus: 'If a party, in the exercise of a legal right—more especially one conferred by statute—does an injury to another's property, he is not liable for damages, unless they were caused by his want of the care and skill ordinarily exercised in like cases,' is the one applicable where the right of passage in a navigable stream is involved. The right is a common and paramount one, but must be exercised with due regard to the rights of riparian owners. The use of the stream must be reasonable, and must be exercised with ordinary care and skill, such as the great mass of mankind would exercise under like circumstances when driving logs. The party using the highway is not an insurer, but he must not be negligent and careless. Floating logs may cause damage to the estate of the riparian owner; but if the party floating or driving the same uses due care and skill, he is not liable for such damage. 'Land on navigable streams is subject to the danger incident to the right of navigation, and when logs are driven in a stream in an ordinarily careful, prudent manner, the owner is not liable for damages which may result to the riparian owner.' Field v. Log-Driving Co., 67 Wis. 569, 31 N. W. Rep. 17; Harold v. Jones, 86 Ala. 274, 5 South. Rep. 438; Booming Co. v. Nelson, 45 Mich. 578, 8 N. W. Rep. 587, 909; Lawler v. Boom Co., 56 Me. 443; Hollister v. Union Co., 9 Conn. 436; Lansing v. Smith, 8 Cow. 146; Thompson v. Improvement Co., 54 N. H. 558.

"The gravamen of an action of this kind is defendant's negligence, and the charge was incorrect."

CONTRACTS—RESTRAINT OF TRADE—VALIDITY.—It is decided by the Supreme Judicial Court of Massachusetts, in Anchor Electric Co. v. Hawkes, that an agreement by officers of three separate corporations engaged in manufacturing and dealing in electric goods, who became officers of a new corporation, which purchased the interest and good will of the others, not to engage in a like business, or compete in any manner for a period of five years, unless upon withdrawing from such corporation if put at a disadvantage in reference to salary, is not such a contract in restraint

of trade as is void as against public policy. The court says: "From very early times certain contracts in restraint of trade have been held void as against public policy. They are objectionable on two grounds: They tend to deprive the party restrained of the means of earning a livelihood, and they deprive the community of the benefit of his free and unrestricted efforts in his chosen field of activity. The distinction was long ago taken between contracts involving a partial restraint of trade and contracts involving a general restraint of trade; the former being held valid if not unreasonable, and the latter invalid. The changes in the methods of doing business, and the increased freedom of communication which have come in recent years, have very materially modified the view to be taken of particular contracts in reference to trade. The comparative ease with which one engaged in business can turn his energies to a new occupation if he contracts to give up his old one makes the hardship of such a contract much less for the individual than formerly, and the commercial opportunities which open the markets of the world to the merchants of every country leave little danger to the community from an agreement of an individual to cease to work in a particular field. The general principle that arrangements in restraint of trade are not favored is, however, firmly established in law, and now, as well as formerly, is given effect whenever its application will not interfere with the right of everybody to make reasonable contracts. Whenever one sells a business with its good will, it is for his benefit as well as for the benefit of the purchaser that he should be able to increase the value of that which he sells by a contract not to set up a new business in competition with the old. The right to make reasonable contracts of this kind in connection with the sale of the good will of a business is well established. But the particular provisions which are reasonably necessary for the protection of the good will of many kinds of business are very different now from those required in the days of Queen Elizabeth. Then the courts had occasion to inquire whether a limitation upon the right to engage in the same business as that sold was unreasonable because it included a town instead of a single parish, or extended a distance of ten miles instead of five. Now the house of lords in England has held by a unanimous decision in a recent case that such a limitation which covered the whole world was not unreasonable. Because in early times it seemed inconceivable that an agreement to refrain from establishing a business of the same kind anywhere in the kingdom should be necessary to the protection of the good will of any existing business, it was laid down as an arbitrary rule that agreements so comprehensive in their terms were void. Thus the restriction between a general restraint of trade and a partial restraint of trade grew up. Contracts applying to any territory less than the whole kingdom were considered in reference to their reasonableness, having regard to the purpose for which the contract was made. By the unanimous decision of the house of lords in the case of Nordenfelt v. Maxim, etc. Co. (1894), App. Cas. 535, affirming the unanimous judgment of the court of appeals in (1893) 1 Ch. 630, it is now settled in England that a covenant, unrestricted as to space, not to engage in a particular kind of business for 25 years, made in connection with the sale of the property of a manufacturing establishment, is valid if, having regard to the nature of the business and the limited number of its customers, it is not wider than is necessary for the protection of the covenantee, nor injurious to the public interests of the country, as were found to be the facts in that case. The earlier English authorities are reviewed at length in the opinions, and it is unnecessary to refer to them here. Arbitrary rules which were originally well founded have thus been made to yield to changed conditions, and underlying principles are applied to existing methods of doing business. The tendencies in most of the American courts are in the same direction. Manufacturing Co. v. Garst, 18 R. I. 484, 28 Atl. Rep. 973; Fowle v. Park, 131 U. S. 88-97, 9 Sup. Ct. Rep. 658; Navigation Co. v. Winsor, 20 Wall. 64; Tode v. Gross, 127 N. Y. 480, 28 N. E. Rep. 469; Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. Rep. 419; Whitney v. Slayton, 40 Me. 224; Association v. Starkey, 84 Mich. 76, 47 N. W. Rep. 604. In this commonwealth the general doctrine of the cases seem to be that, in connection with the sale of the good will of a business, the vendor will be bound by any covenant which is reasonably necessary for the preservation and protection of the property which he sells. Pierce v. Fuller, 8 Mass. 223; Perkins v. Lyman, 9 Mass. 522; Stearns v. Barrett, 1 Pick. 443; Palmer v. Stebbins, 3 Pick. 188; Pierce v. Woodward, 6 Pick. 206; Angier v. Webber, 14 Allen, 211; Dean v. Emerson, 102 Mass. 480; Machine Co. v. Morse, 103 Mass. 73; Boutelle v. Smith, 116 Mass. 111; Ropes v. Upton, 125 Mass. 258; Handforth v. Jackson, 150 Mass. 149, 22 N. E. Rep. 634. In cases in which such covenants have been held bad they were deemed to go further than was reasonable to give full value to the property sold. In Bishop v. Palmer, 146 Mass. 469, 16 N. E. Rep. 299, relied on by the defendant, the covenant was unrestricted as to space, and was made in connection with the sale of the property and good will of a local business, not peculiar in its nature, for the protection of which so extensive a covenant was held to be unnecessary. The case of Telegraph Co. v. Crane, 160 Mass. 50, 35 N. E. Rep. 98, is not inconsistent with the contention of the plaintiff. It is said in the opinion that the 'plaintiff did not buy the good will of a mercantile business, and the defendant, Crane, had no customers for fire alarm and police telegraph machines and apparatus.' A ground of the decision stated by a majority of the court is as follows: 'The stipulation seems to us to be something more than is reasonably necessary to protect the plaintiff in the enjoyment of the property it bought, even if

that should be adopted as the test, upon which we express no opinion.' Inasmuch as the stipulation in the present case is only to do no business for five years that shall interfere with or compete with the proposed business of the Anchor Electric Company, it seems quite clear, under the authorities in Massachusetts, that the stipulation goes no further than is reasonably necessary to protect the good will of the business sold by the defendant's corporation, and that it should, therefore, be held valid, unless a distinction is to be made between competition with the business of the Anchor Electric Company and competition with the business sold by the defendant and his company. The business sold by the defendant was chiefly installing and constructing electric plants and appliances. The business of the new corporation included with this that which formerly was done by the other two companies, namely, manufacturing and dealing in electrical appliances. In considering this branch of the case, the nature of the contract of sale should be regarded. The defendant's business was sold to be conducted as a part of a new and more general business. Very likely the price paid for it was larger, and the good will was deemed more valuable because it was to be so conducted. The plaintiff corporation carried on different, but closely connected, departments of the electrical business, and the different departments were so related to each other that sometimes it would be difficult, if not impossible, to distinguish between competition with one department and competition with another. Moreover, this was a contract for mutual profit in conducting the new business, which, under the findings of the court, has all presumptions in its favor. Each party was to devote himself to the interests of the new corporation. Although the parties provided for the establishment of a corporation, their arrangement was in the nature of a co-partnership. The profits of the new corporation were to be shared by the old corporations, which had sold their property, and become stockholders in the new one. It is difficult to see any good reason why the contract of the three persons to promote the interests of the new corporation should not be binding upon them. This contract necessarily includes the agreement not to enter into competition against the new corporation. The case seems to come within the language of Chief Justice Chapman in Machine Co. v. Morse, 103 Mass. 73-75, where he says the 'defendant did not technically become a partner with the plaintiffs, yet he became the associate of the other stockholders in the business, he himself inducing them to join him in it, and having a large interest of the company; and the same principle that enables a partner to do nothing in competition with the business of the firm ought to apply to him.' "

MARRIAGE — PRESUMPTION OF VALIDITY.—In *Re* Rash's Estate, before the Supreme Court of Montana, it appeared that plaintiff and intestate intermarried in 1858, and six years afterwards she left the intestate and in 1872 was again married. Intestate married B in 1894. Plaintiff alleged that intestate had never been divorced from her. It was held that the burden of proving the absence of a divorce was on plaintiff, though it was a negative, since the law raises a strong presumption that all marriages are legal. The court said: "Counsel for appellant contend the decree of the court adjudging respondent Berthena C. Rash to be the legal surviving widow of the deceased, Daniel Rash, and as such widow entitled to share in the distribution of his estate, is not supported by the evidence, and is contrary to law. It is argued that this decree is based upon the legal presumption that at some time and place a divorce had been granted, by some court of competent jurisdiction, dissolving the marriage relation entered into between the appellant and Daniel Rash in Iowa in the year 1858. There is no evidence of such divorce. Counsel contend that the court held that it was incumbent upon appellant to prove that there had not been such divorce, and that it was error on the part of the court to presume such divorce, in the absence of evidence to the contrary. It is contended that there is nothing in the pleadings suggesting that there ever was such divorce of the parties. In the complaint, however, there is an allegation that the bonds of matrimony entered into between appellant and Rash had never been dissolved by divorce. This allegation, and all other allegations not admitted, are denied generally by the answer. Counsel say that to prove that there had never been a divorce between the parties would have required the appellant to prove a negative, which in this case, they say, would have been impossible. Treating the subject of proving a negative, Nelson, in his recent work on Divorce and Separation (volume 2, § 580), says, 'But this difficulty of proof is not unusual in such cases, since it is the rule that all presumptions shall be made in favor of marriage, where matrimony was the desire of the parties.' The argument of counsel for the appellant overlooks the real issue in this case. It is an admitted fact that the respondent and Daniel Rash were married in Missoula county in January, 1894, and lived together as husband and wife until the death of Rash. It is also a fact that the appellant attacks the validity of this marriage, and that this marriage must be decreed to be invalid before appellant can be held to be the legal surviving widow of Rash, and entitled, as such widow, to share in the distribution of his estate. What burdens as to proof, then, does the law, under such circumstances, devolve upon the appellant? Bishop, in his work on Marriage and Divorce (volume 1, § 457), lays down the rule in such cases as follows: '*Semper præsumitur pro matrimonio.*' Every intendment of the law is in favor of matrimony. When a marriage, therefore, has once been shown, however celebrated, whether regularly or irregularly, or however proved, whether directly or by circumstantial evidence, the law

raises a strong presumption in favor of its legality; so that the burden is with the party objecting, throughout, and in every particular, to prove, against the constant pressure of this presumption of law, that it is illegal and void. And it has been considered that the validity of a marriage cannot be tried like any other question of fact which is independent of presumption, because the law, besides casting the burden of proof upon the objecting party, will still presume in favor of the marriage, and this presumption increases in strength with the lapse of time through which the parties are cohabiting as husband and wife. It being for the highest good of the parties, of the children, and of the community, that all intercourse between the sexes, in its nature matrimonial, should be such in fact, the law, when administered by enlightened judges, seizes upon all presumptions both of law and of fact, presses into its service all things which can help it, in each particular case, to sustain marriage, and repel the conclusion of unlawful commerce.' In Boulden v. McIntire (Ind. Sup.), 21 N. E. Rep. 445,—a case very similar to the one at bar, though not so strong in its essential facts,—the court collates the leading cases involving the questions under discussion here, and comes to this conclusion: 'As we have seen from the authorities above cited, the law requires the party who asserts the illegality of a marriage to take the burden of that issue, and prove it, though it may involve the proving of a negative.' In Klein v. Laudman, 29 Mo. 259, a case involving this doctrine, the court said: 'There was not any evidence that the first husband of Mrs. Klein was dead, but, if this had been established, we think she was entitled to the benefit of the favorable presumption that the first marriage had been dissolved by divorce.' We cite, to the same effect, Erwin v. English (Conn.), 23 Atl. Rep. 753; Johnson v. Johnson, 114 Ill. 611, 3 N. E. Rep. 232; Carroll v. Carroll, 20 Tex. 731; Cartwright v. McGown, 121 Ill. 388, 12 N. E. Rep. 737; and cases cited in Boulden v. McIntire, *supra*. In Teter v. Teter, 101 Ind. 129, speaking of the presumptions in favor of the validity of a marriage, the court uses this strong language: 'The presumption in favor of matrimony is one of the strongest known to the law. The law presumes morality, and not immorality; marriage and not concubinage; legitimacy, and not bastardy.' We think the authorities are practically uniform upon the questions presented in this appeal. In this case the appellant took upon herself the burden of showing the marriage between the respondent and Rash to be invalid. In order to do so, it was incumbent upon her to show that there never had been a divorce granted to Rash from her. It was incumbent upon her to show this fact, notwithstanding it required her to prove a negative.

PARTNERSHIP—FIRM AND INDIVIDUAL CREDITORS—ASSIGNMENT — FRAUD. — The Supreme Court of Arkansas holds in Bartlett v. Meyer-Schmidt Grocer Co., 45 S. W. Rep. 1063, that creditors of insolvent partnerships have an equity in the firm assets entitling them to payment in preference to creditors of individual members of the firm which cannot be extinguished by a general assignment by the firm for the benefit of creditors, and that under a statute providing that conveyances made with the intent to hinder, delay, and defraud other persons of their lawful demands shall be void, a general assignment by a partnership for the benefit of creditors, providing for payment of creditors of individual members of the firm out of firm assets, in preference to firm creditors, is void. The court said:

"1. When one makes an assignment for the benefit of creditors, he brings the assets included therein under the control of a court of chancery. If the assignment is valid, the court must administer the assets, through the assignee, according to its provisions. If, for any cause, the assignment be valid, then the property embraced therein is administered for the benefit of all the creditors, *pro rata*, as under the provisions of a general assignment without preferences. Acts 1895, p. 162. Therefore, if the provisions of the assignment contravene well-established principles of equity, a court of chancery will not enforce them, but will proceed to dispose of and distribute the property for the benefit of all the creditors, *pro rata*, who in equity are justly entitled to same. 'It was,' says Judge Kent, 'a principle of the Roman law, and it has been acknowledged in the equity jurisprudence of Spain, England, and the United States, that partnership debts must be paid out of the partnership estate, and private and separate debts out of the private and separate estate of the individual partner.' 'The basis of the general rule is that the funds are to be liable on which the credit is given.' 3 Kent, Comm. *65. In Bulger v. Rosa, 119 N. Y. 465, 24 N. E. Rep. 853, the court say: 'There can be no controversy as to the rule of law governing the relations between an insolvent firm and its creditors, and their mutual rights in respect of the firm property. The partnership, as such, has its own property and its own creditors, as distinct from the individual property of its members, and their individual creditors. The firm creditors are preferentially entitled to be paid out of the firm assets. Whatever may be the true foundation of the equity, it is now an undisputed element in the security of the firm creditors.' In Hollins v. Iron Co., 150 U. S. 385, 14 Sup. Ct. Rep. 130, the court, through Judge Brewer, said: 'Whenever, a partnership becoming insolvent, a court of equity takes possession of its property, it recognizes the fact that in equity the partnership creditors have a right to payment out of these funds in preference to individual creditors, as well as superior to any claims of the partners themselves.' This is an old and firmly-established doctrine of equity, recognized generally in the works on Partnership and Jurisprudence, and in the adjudications of many courts. Story, Partn. § 376; Pars. Partn. §§ 246, 382, *et seq.*;

Colly, Partn. § 920; Smith, Eq. § 547(2); 2 Lindl. Partn. § 692; 2 Bates, Partn. § 825; 1 Pom. Eq. Jur. § 1046; Story, Eq. Jur. §§ 1207, 1253; 2 Beach, Mod. Eq. Jur. 788; Bisp. Eq. § 515; Inbusch v. Farwell, 1 Black, 566; Murrill v. Neill, 8 How. 414; Crooker v. Crooker, 52 Me. 267; Treadwell v. Brown, 41 N. H. 12; Whaling Co. v. Borden, 10 Cush. 458; Hill v. Beach, 12 N. J. Eq. 31; Simmons v. Tongue, 3 Bland, 356; Converse v. McKee, 14 Tex. 20; Murray v. Murray, 5 Johns. Ch. 72, *et seq.*; McCulloh v. Dashiell, 1 Har. & G. 99; Giovanni v. Bank, 55 Ala. 310; Davis v. Howell, 33 N. J. Eq. 72; *Ex parte* Crowder, 2 Vern. 706; *Ex parte* Cook, 2 P. Wms. 500; *Ex parte* Hunter, 1 Atk. 223, 227, 228; *Ex parte* Elton, 3 Ves. 242, note; Bish. Insolv. It would unnecessarily incumber this opinion to trace the history and reason of this doctrine of equity from its origin, through various fluctuations, and to its final establishment in England, whence it came to this country. This has been exhaustively and ably done in Murray v. Murray, McCulloh v. Dashiell, and Murrill v. Neill, *supra*, and in a learned note beginning on star page 265 of volume three of Kent's Commentaries, to which we refer any who may have the interest, curiosity and patience to pursue the subject. It is enough for us to know that the rule exists, and that, upon the whole, it is reasonable, convenient, and just. But it is contended that the rule cannot be enforced here, for the reason that the equities of the individual members of the firm, whence this equity of the firm creditors is derived, has been extinguished by the assignment, to which each member of the firm assented; and the following cases are cited to support this contention: Jones v. Fletcher, 42 Ark. 423; Feucht v. Evans, 52 Ark. 556, 13 S. W. Rep. 217; Reynolds v. Johnson, 54 Ark. 439, 16 S. W. Rep. 124; Hudgins v. Rix, 60 Ark. 18, 28 S. W. Rep. 422, and 30 S. W. Rep. 767. We are aware that the court is committed to the doctrine, announced in some of these cases, that the equity of partnership creditors can only be worked out through the equity of the partners. But we have never held that the equity of the partners, and hence the derivative equity of firm creditors, was or could be extinguished by an assignment made by an insolvent firm for the benefit of creditors. In none of the above cases was an assignment for the benefit of creditors involved. That makes the difference, and it is marked. Case v. Beauregard, 99 U. S. 119, quoted from and cited as a leading case in the Arkansas decisions, *supra*, is strong authority for the position that the equity of firm creditors would be enforced in case of an assignment; for, says the court in that case, speaking of the enforcement of this equity: 'It is indispensable, however, to such relief, when the creditors are, as in the present case, simple contract creditors, that the partnership property should be within the control of the court, and in the course of administration—brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode.' Precisely what has been done in this case. In Giovanni v. Bank, 55 Ala., at page 310, it is said: 'When the partnership property is drawn within the jurisdiction of a court of equity, that court regards it as a trust fund for the payment of partnership debts, and subrogates the partnership creditors to the rights of the partners, *inter sese*.' 'Courts regard partnership property, after an insolvency or dissolution of the firm, and in the proceeding for winding up its affairs, as a trust fund for the benefit of the firm creditors.' 2 Pom. Eq. Jur. § 1046, and authorities cited. Under our statute a general assignment by a firm for the benefit of creditors, although its provisions as to preferences cannot be enforced, nevertheless operates as a winding up of the partnership business, and is, in effect, a dissolution of the partnership, and a calling upon the chancery court to administer its assets according to equitable rules. 2 Bates, Partn. § 483; Allen v. Woonsocket Co., 11 R. I. 288; Simmons v. Curtis, 41 Me. 373; Wells v. Ellis, 68 Cal. 243, 9 Pac. Rep. 80; McKelvy's Appeal, 72 Pa. St. 409. Such a conveyance neither creates nor destroys equities. These are left as they were when the assignment was made. The very fact of the assignment is a declaration by the firm that its business career has closed, and the law is invoked to wind up its affairs. Before, the firm has been acting for itself. Now what it does is for the benefit of creditors, and it is not authorized, as a firm, to benefit any but its own creditors. The above is the rule which a court of equity would enforce in an assignment for the benefit of creditors, simply because it is a rule of equity, and regardless of any actual or intentional fraud.

"2. But such an assignment as this must be held as actually and intentionally fraudulent. It contravenes our statute concerning fraudulent conveyances. Sand. & H. Dig. §§ 3471, 3472. It purports to be an assignment by a firm for the benefit of creditors, but it is in fact an assignment for the benefit of one of the individual members of the firm. It directs that the firm assets shall pay the individual debts of one of its members. This is equivalent to a gift to him or his creditor, and is to that extent a withholding of firm assets for the private benefit of one of its members, and, of course, hinders, delays and defrauds firm creditors. From these facts, an intent to defraud creditors will be conclusively presumed. Such is the law in New York, and other States where statutes against fraudulent conveyances like our own were modeled after 13th Eliz., and the doctrine has our unqualified approval. Kirby v. Shoonmaker, 3 Barb. Ch. 46; Wilson v. Robertson, 21 N. Y. 592, and other cases cited in Burrill, Assignm. p. 236."

WHAT CONSTITUTES "A BREAKING" IN BURGLARY.

Judging from the opinions of courts, even of this late date, there is not a well defined understanding yet as to what constitutes a breaking in prosecutions for burglary under the common law. The Court of Appeals of Kentucky recently[1] held that removing of props from a warehouse door in order to open and enter in, is a breaking, but if a door or window is partly open, it is not a breaking to push it further open with intent to enter. By what references of reason the court could arrive at such a conclusion it is difficult to tell. And the Kentucky court did this the next moment after quoting the language of Bishop, where he says plainly, "the mere lifting of a latch, and so opening a door, or pushing upward or lowering a sash, or raising a trap door, constitutes a breaking."[2] It is certainly not doing justice to such a sensible, logical authority as Mr. Bishop is well known to be, to assume from what he has said of a breaking, might be assumed what the Kentucky Court of Appeals says in this case above cited. Indeed the opposite conclusion would be the fairest presumption. The opinion of the Kentucky court well illustrates the character of the technical reasoning indulged in by courts of the highest resort. The practice has become a vice on the part of some courts. It should be known by jurists and lawyers that the broad principles of the common law are built upon common sense, and common sense is reason. Coke said, "law is reason itself." Could the judges of the Appellate Court of Kentucky have this in mind when they announced such nonsense? It is well known that the element which gives character to "a breaking" is force. Suppose this window, or door, left a little way open by the Kentucky court, is thus left open for the purpose of ventilation, a mere space of a few inches, and a person intent upon committing the crime of burglary opens it a little further so as to admit his body. Is this a breaking according to good authority—Bishop, Russell or Wharton? Is there no force used in thus gaining an entrance? There certainly is. If it is necessary to raise or lower the window or push the door in, however small a degree, it necessarily implies sufficient force so to do. That is actual force, not constructive, and that any courts should hold different is beyond the comprehension of ordinarily intelligent persons. Bishop on Criminal Law is quoted by the Kentucky court as authority which that court is inclined to follow. Then, as Mr. Bishop says, the mere lifting of a latch and so opening a door, not otherwise fastened, or pushing upward or lowering a sash, or raising a trap door, constitutes the element of breaking in, the commission of this crime, then it must certainly be that the raising of a window, which is already partly open, sufficiently to admit the entrance of a person, intent upon the commission of a crime, makes out the gravamen of the crime of burglary. This conclusion, it seems to me, is in accordance with the spirit and intent of the law, and the reasoning of the Kentucky court has not the merit of being subtle.

Burglary at the common law is where a person breaks and enters any dwelling house in the nighttime with intent to commit a felony,[3] and this breaking is either actual or constructive. Actual breaking would be where actual force is used in gaining an entrance, such as picking a lock; breaking a hole in a window, or door; raising a window, or lowering one; lifting a latch and so opening a door; or loosening any fastening which has been provided to keep closed such dwelling.[4] Constructive breaking is where an entrance is gained through the agency of constructive force. That is where fraud or threats are used by the person intent upon committing the crime, or collusion with some one inside. One gaining entrance into a dwelling in the nighttime with intent to commit the crime, by representing himself as a proper person of the household, an officer, etc., uses constructive force in doing so. So one who gets into the dwelling with such intent through the open door, by means of exciting the fears of the owner, for his personal safety, is guilty of constructive force in so doing. And one gaining such entrance through the help of servants of the household, who are in collusion with such person, with intent to commit the crime, uses constructive force, and is guilty of the crime of burglary.

It will be seen from the above, then, that all breaking necessarily includes force, and the

[1] Rose v. Commonwealth, 40 S. W. Rep. 245.
[2] 1 Bishop Crim. Law, sec. 312.
[3] Bishop Crim. Law, vol. 1, sec. 312.
[4] See Walker v. State, 52 Ala. 376.

force is regarded as of the same character, whether it is actually applied by physical strength, or implied from the use of such means as have been mentioned above. And when "a breaking" is sufficiently alleged in an indictment, this includes force.[5] It has been held by the courts of several of the States that the lifting of a latch, opening and entering a dwelling in the nighttime, with intent to steal therefrom, if this is the ordinary way of gaining an entrance, will constitute the crime of burglary.[6] Pushing open a closed door will constitute an actual breaking, say the courts of Ohio, Michigan, Iowa, Kansas and Alabama.[7] Going into a railway car by a person with the intent of committing this crime, the fact that the door was unlocked was held by the Illinois court, in the case of The People v. Lyons,[8] as not material in constituting the force necessary to be used in effecting an entrance. Where the owner slept in one part of a dwelling and the servants in another and the door at the foot of the stairs leading to the owner's chamber was kept latched, and a servant of the household, in the nighttime, unlatched the door and went into the owner's chamber, with intent to commit a crime, the entrance was held to constitute a breaking within the meaning of the law and respondent held guilty of the crime of burglary.[9] And in same spirit the Alabama court,[10] where an attorney employed a man servant about his office and intrusted him with the keys thereof, held such person guilty of burglary if he entered such office at night by the use of such keys with such intent. But if such servant was in the habit of sleeping in the office, then he could not be held for burglary as the element of a forcible entry would be lacking. In an old English case, the act of the respondent in entering a dwelling by the back door, which was left open, and in order to accomplish his intent broke open an inner door, was held to constitute the crime of burglary.[11] Getting into and descending the chimney of a house with intent to steal constitutes burglary, although the room below is not entered.[12] Lifting a window clasp and thus effecting an entry into a dwelling constitutes a breaking, in the opinion of the Missouri court.[13] Breaking open the outer door of an apartment house, with the requisite criminal intent, where the house contained three apartments, but one of which is occupied, is a burglary, notwithstanding the Penal Code, sec. 503, provides that if a building consists of two or more parts intended to be occupied by different tenants usually lodging therein at night, each part is deemed a separate dwelling house of the tenant occupying the same, and as a separate building.[14] The Supreme Court of Massachusetts, in Commonwealth v. Lowrey,[15] holds that one who with the felonious intent to commit the crime of larceny, and in pursuance of a preconcerted scheme with an accomplice, who pretends to the clerk that he wants to buy some article, in the nighttime procures himself to be let into the store by the accomplice, while the clerk is in the cellar looking for the article, is guilty of the breaking, although he did not himself open or touch the door through which he passed. But it is well settled that entering at an open door, or through a hole, which the person being intent to commit a crime finds ready for him, is not such an entering by force as is needed to constitute the element of breaking in this crime.[16]

The Texas court, in Martin v. State,[17] in affirming a conviction, held that if a door is left so far open that a person accomplishes an entry without touching or moving it in any manner, there is no such breaking as would be necessary in a prosecution for burglary. But if he has been obliged to use force, however slight, in pushing open the door, to effect such entrance, such force should constitute a breaking as much so as the lifting of a latch or

[5] See Sub. Burglary, 2 Am. & Eng. Ency. of Law, 660; Matthews v. State, 36 Tex. 675; Shotwell v. State, 43 Ark. 345.

[6] People v. McCourt, 64 N. Y. 583; Gromey v. State, 33 Kan. 18; State v. Jansen, 22 Kan. 498; State v. Frank, 39 Miss. 705.

[7] See Timmons v. State, 34 Ohio St. 428; State v. Reid, 20 Iowa, 413; People v. Nolan, 22 Mich. 229; State v. Comstock, 20 Kan. 650; State v. Carter, 68 Ala. 96.

[8] 68 Ill. 271.

[9] U. S. v. Bowen, 4 Cranch C. C. 604.

[10] Lowder v. State, 63 Ala. 143.

[11] See Rex v. Johnson, 2 East, Plead. 488.

[12] Olds v. State, 12 South. Rep. 409.

[13] State v. Moore, 22 S. W. Rep. 1086.

[14] People v. Calvert, 51 N. Y. Sup. Ct. Rep. 186.

[15] 158 Mass. 18, 32 N. E. Rep. 940.

[16] Timmons v. State, 34 Ohio St. 426; Commonwealth v. Stephenson, 8 Pick. 354; Commonwealth v. Strupney, 105 Mass. 588; Hamilton v. State, 11 Tex. App. 116; Stone v. State, 63 Ala. 115; Green v. State 68 *Id.* 539.

[17] 40 S. W. Rep. 270.

the pushing open of a closed door. And the pushing open of a closed door which is held shut merely by the friction of the door with the casing was held a sufficient breaking.[18] In another case, decided in the sister State of Georgia, in Marshall v. State,[19] it was held that one who effects an entrance to the upper story of a gin-house through the lower story, which is left open, and thence through a hole in the floor left for belting to run through, with felonious intent commits the crime of burglary. It was held by the Supreme Court of California,[20] that the entry into a store building through the public entrance, while open for business, at night, with intent to commit the crime of larceny, constituted a breaking within the meaning of the laws of the State, and affirmed the conviction of respondent. The statutes of the different States provide for prosecutions for the crime of burglary, and at the same time define those acts which shall constitute the crime of statutory burglary. To define the elements necessary to constitute burglary is the promise of the court. To tell the jury what acts of a person would amount to "a breaking" is the duty of the court, as these are questions of law. But if this particular Kentucky court that rendered the opinion above in Rose v. Commonwealth is to go on with such opinions, it would be well perhaps for the legislature to restrict the promise of the courts in burglary cases, at least, or to provide for the proper reception into Kentucky of all the gentleman burglars in the country.

PERCY L. EDWARDS.

[18] Sparks v. State (Tex.), 29 S. W. Rep. 264.
[19] 94 Ga. 589.
[20] People v. Barry, 94 Cal. 481, 29 Pac. Rep. 1026.

LIFE INSURANCE—CANCELLATION OF POLICY—REMEDY OF INSURED—RECOVERY OF PREMIUMS PAID.

METROPOLITAN LIFE INS. CO. v. McCORMICK.

Appellate Court of Indiana, January 12, 1898.

In the absence of an agreement by the insurer to return premiums paid, the assured cannot recover therefor when the insurer refused to receive any more premiums, and wrongfully cancels the policy.

An insured, who has performed all the conditions imposed on him by a life policy, duly issued, and wrongfully canceled, by the insurer, may recover the present value thereof.

The insured, under a life policy which has been wrongfully canceled by the insurer, may tender the premiums as they become due, and on the death of the insured the full amount of the policy may be recovered.

The insured, under a life policy which has been wrongfully canceled by the insurer, may sue in equity, and have it declared valid.

WILEY, J.: Appellee sued appellant to recover premiums paid on numerous life insurance policies issued to appellee by appellant upon his life, and upon the life of members of his family. The complaint avers that, beginning in 1891, and up to and including May 22, 1893, appellant issued to appellee eight separate policies, the premiums upon which were payable weekly; that he paid said premiums as they became due, up to July 20, 1895, and paid in all $200; that on said 20th of July, 1895, there was due upon all of said policies, as premiums, the sum of 99 cents, which said sum was duly tendered to appellant, through its proper officer, at its office in Indianapolis, Ind., but that appellant refused to accept and credit the same, and has ever since refused, wrongfully and without cause, to receive from appellee the premiums due on said policies, and declared said policies void, and has lapsed and canceled the same. It is further averred that appellant still illegally and wrongfully withholds from appellee the amount so paid by him as premiums upon said policies; that demand has been made upon appellant for the return of all of said premiums, and that it has refused to pay the same; and that, by reason of the illegal and wrongful forfeiture and cancellation of said policies, appellant became, and still is, indebted to appellee in the sum of $200, as and for money had and received for the use of the appellee, to his damage, etc. The issues were joined by general denial. Trial by the court resulted in a judgment for appellee in the sum of $197.71.

In the court below the sufficiency of the complaint was not challenged by a demurrer, but it is called in question for the first time on appeal, by the assignment of error that it does not state facts sufficient to constitute a cause of action. It is insisted with great earnestness that the complaint omits the averment of a material and necessary fact, essential to the existence of the cause of action attempted to be stated, and that for such omission the complaint is bad, and may be attacked for the first time in the appellate tribunal. The sufficiency of the complaint was not challenged below by a demurrer, but the rule is well settled in this State that, if the complaint omits to state a material fact essential to plaintiff's right of recovery, the question may be raised for the first time on appeal. Smith v. Smith, 106 Ind. 43, 5 N. E. Rep. 411; Taylor v. Johnson, 113 Ind. 164, 15 N. E. Rep. 238; Burkhart v. Gladish, 123 Ind. 337, 24 N. E. Rep. 118.

The material fact which appellant claims was necessary to aver, and essential to appellee's recovery, is that the complaint fails to allege any contract conferring upon appellee the right to recover the premiums paid by him, in full. It is clearly apparent, from the averments of the com-

plaint, that, up to a certain date, appellee paid all premiums on his several policies as they matured. On July 20, 1895, when he tendered another payment, and all that was then due, the same was refused, and his policies declared forfeited; and upon these facts he charges in his complaint a cancellation or forfeiture of valid, existing policies, and seeks to recover the full amount of premiums paid, without averring that his contract of insurance gave him this right. As to whether the policies contain a provision for the return of the premiums in case they are canceled, we are not advised, as a matter of fact, for they are not made parts of the complaint by exhibit, and there is no such averment in the complaint; but, in the absence of such averment and the policies, we must assume that they contain no such provision. Conceding that the fault, if any, of the cancellation of the policies, was appellant's, and that the appellee performed all the conditions of his several contracts, the question presents itself, has he sought his proper remedy? It seems to us that this inquiry must be answered in the negative. Here appellee seeks to recover all the money paid as premiums while the policies, as he avers, were valid and in full force. If his policies were wrongfully canceled, then, in law, they are still in force, and he could require them, by proper proceedings, to be reinstated, or he could bring an action for damages; and in such case his measure of damages would be the cash surrender value of his policies. If appellee can recover, upon the theory of his complaint, on what he avers were valid policies, then appellant would be required to carry the several risks, from the time the several policies were issued up to the time of their alleged wrongful cancellation, without compensation. The several policies were issued upon the lives of appellant and members of his family. If death had intervened at any time prior to their alleged cancellation, appellant would have been liable, provided appellee had performed all of the conditions of the several contracts on his part. By the issuing of the policies and the payment of the premiums, appellant assumed the risks therein provided against. In other words, the risks had attached, and appellant had assumed them. There seems to be a well-defined distinction between cases where the risk has attached and where it has not attached. In the latter case, all the premiums must be returned, and an action will lie for their recovery. Hawke v. Insurance Co., 23 Grant, Ch. (Can.) 139; Jones v. Insurance Co., 90 Tenn. 604, 18 S. W. Rep. 260; Joliffe v. Insurance Co., 39 Wis. 111, 117; Insurance Co. v. Tomlinson, 125 Ind. 84, 25 N. E. Rep. 126; Tyrie v. Fletcher, Cowp. 668; Stevenson v. Snow, 3 Burrows, 1237; Waters v. Allen, 5 Hill, 421; Clark v. Insurance Co., 2 Woodb. & M. 472, Fed. Cas. No. 2829; Anderson v. Thornton, 8 Exch. 425. This rule is certainly grounded in sound reason. In such case the insurance company has not incurred any risk, and hence is not entitled to any compensation. But where the risk has attached, and the company has assumed liability in case of loss, the rule must be different. It cannot be presumed that an insurance company can assume liability upon one of its policies, and, after carrying the risk for a certain period, be required to refund all the premiums paid while, as in this case, as charged, the policies were in full force and valid, and the company refused to accept the payment of another premium when due, and canceled it. In each of the policies issued to appellee by appellant, premiums were paid, and the risks attached. In Waters v. Allen, 5 Hill, 421, it was held that there could be no return of the premium where the policy attached, though only for a single moment. Mr. Bliss says: "Where the policy has been void *ab initio*, or in any case 'where a premium has been paid, but the risk has not been run, whether this has been owing to the fault, pleasure, or will of the assured, or to any other cause, the premium shall be returned by the insurer. But, if the risk has once commenced, there shall be no apportionment or return of the premium afterward,'"—quoting Lord Mansfield in Tyrie v. Fletcher, Cowp. 668; Bliss, Ins. (2d Ed.) p. 750, § 415. Mr. May says: "If a policy be void *ab initio*, or if the risk never attaches, and there is no actual fraud on the part of the insured, and the contract is not against good law or good morals, etc., he may recover back all the premiums he may have paid. * * * But, if the risk once attaches, the premium is not apportionable." May, Ins. § 567. In Clark v. Insurance Co., 2 Woodb. & M. 472, at page 493, Fed. Cas. No. 2,829, the court said: "If it [the policy] once attaches, the premium is not to be restored, however short the time. Certainly not the whole of the premium, and none unless it can be properly divided, and a part of the risk, as in some sea usages, can be considered as never having been incurred." In Insurance Co. v. Tomlinson, 125 Ind. 84, 25 N. E. Rep. 126, the court, by Elliott, J., said: "The moment the risk attached, the premium paid was beyond recovery by the insured. His right is correspondent to his burden. He cannot get his money back, but he can enforce his contract." The complaint avers that "the said defendant still illegally and wrongfully retains and withholds from this plaintiff the aforesaid sum of money paid by him to said defendant as premiums upon said policies of insurance. And demand has been made by the plaintiff for the return to him of all of said premiums by it collected from said plaintiff, yet said defendant refuses and neglects to repay the same." From the whole complaint, it is evident that the theory upon which it is drawn is for the recovery of money paid by appellee to appellant as premiums upon certain insurance policies. In Insurance Co. v. Houser, 111 Ind. 266, 12 N. E. Rep. 479 (which was a second appeal), the court said: "There is no evidence in the record of this case, as now presented, which proves, or tends to prove, that appellant ever had and received any money for

the use and benefit of appellee, upon any account other than premiums paid upon a valid risk assumed by appellant upon the life of Louise Hesse. Under the law of this case, as declared by this court on the former appeal therein, such premiums so paid cannot be recovered back from the appellant as for money had and received." In Insurance Co. v. Houser, 89 Ind. 258, the action was very similar to the one in hand. There an action was brought to recover the premiums paid on a policy of life insurance. The appellee had paid the annual premiums for a certain number of years; and when another annual premium became due, appellee went to pay it to appellant's agent at Terre Haute, but was unable to find any one authorized to receive the money, and, on failure to pay, the policy was declared forfeited. The court, by Elliott, J., said: "It is not easy to determine upon what theory the paragraph [fourth paragraph of complaint] is constructed, but counsel on both sides treat it as a complaint for the recovery of the premiums paid by the appellee. We do not think the paragraph good for any purpose, or upon any theory. There is no averment of performance of the conditions of the contract on the part of the assured; nor, indeed, is there any statement of the terms or conditions of the contract. For anything that appears, appellant may have had an undoubted right to forfeit the policy. * * * Where a plaintiff grounds a right of action upon a breach of such a contract, he must show performance on his part, and a wrongful refusal or failure to perform on the part of his adversary. It is not enough to show non-performance, for there may be non-performance without a breach. In order to make a good complaint in such an action as this, the plaintiff must show the terms and conditions of the contract, performance on his part, and a failure or refusal to perform on the part of the other party, constituting a breach of the contract. There is nothing in the complaint before us showing that the refusal to perform was not fully justified by the terms of the policy. The policy was valid in its inception, and there was for a time a risk; and the general rule is that, where the risk attaches, the premium cannot be recovered from the company. Bliss, Ins. 750; May, Ins. 567. If there was a continuing, valid risk up to the time the last premium was tendered and refused, then the premiums previously paid cannot be recovered. May, Ins. 568, 569. If, however, the act of the appellant in declaring a forfeiture was wrongful, then there must be a remedy. We do not feel called upon to decide whether the remedy would be a reinstatement of the policy, or an action for its value, for the complaint is insufficient in any view that may be taken of the question." In line with the case from which we have just quoted is Day v. Insurance Co., 45 Conn. 480. In Insurance Co. v. Houser, *supra*, the court suggests, but does not assume to decide, that the appellee might have had some other remedy. That the appellee in this case has a remedy, if he has been wronged by appellant's acts, and he has performed all the conditions of the contract of insurance on his part, there can be no doubt. Where a life policy has been duly issued, and is wrongfully canceled by the insurer, the insured may sue and recover for the present value of the policy, or he may tender the premiums as they become due, and recover the full amount of the policy on the death of the insured, or he may proceed in equity, and have a decree sustaining and declaring valid the contract of insurance. Day v. Insurance Co., *supra;* Insurance Co. v. Weck, 9 Ill. App. 358; Clemmitt v. Insurance Co., 76 Va. 355. In Standley v. Insurance Co., 95 Ind. 254, the court said: "If a policy is valid in its inception, then the company cannot be required to refund the premiums received, although it may subsequently wrongfully attempt to declare a forfeiture." We might cite numerous other cases from many of the States in harmony with the rule above announced, but it seems useless to do so. We do not lose sight of the fact that in some of the States a different rule prevails, but the great weight of the authorities is in consonance with the cases above cited. Here there is no averment that appellee performed all of the conditions of the several policies issued to him by appellant. The complaint avers that said policies provided for certain premiums to be paid weekly, and this is the only condition which he says he performed. There may have been, and doubtless were, numerous conditions to be performed by him. As was said in Insurance Co. v. Houser, *supra*, to make his complaint good it was necessary for him to aver the terms and conditions of his contracts, that he performed all of the terms on his part, and that appellant failed or refused to perform all the conditions on his part; such failure or refusal constituting a breach of the contracts. The complaint, in our judgment, does not state facts sufficient to constitute a cause of action. The record presents, and counsel have argued, other questions; but, as the complaint does not state a cause of action, it is unnecessary for us to consider them. Judgment reversed.

NOTE.—*Recovery of Premiums Paid.*—The liability of an insurance company for the return of premiums is by no means absolute, but depends upon whether there is an agreement by the insurer to return premiums paid, or whether the policy has ever become a binding contract between the parties.

Distinction.—There is a well defined distinction between cases where the risk has attached and those where the risk has not attached. If the policy has once become a binding contract between the parties, and the risk has once commenced, then there can be no apportionment, nor will an action lie for the premiums paid. When a company has accepted as valid and subsisting, that moment the risk attaches and the premiums paid are beyond recovery by the insured. Mailhout v. Met. Life Ins. Co., 32 Atl. Rep. 989, 25 Ins. L. J. 79; Insurance Co. v. Tomlinson, 125 Ind. 84. Premiums paid to secure insurance cannot be recovered if the risk has once attached. And where the policy is valid in its inception, then the company cannot be required to refund the premiums received, al-

though it may subsequently wrongfully declare a forfeiture. Standley v. Northwestern Mut Life Ins. Co., 95 Ind. 254. If a policy is valid in its inception, and there is for a time a risk assumed and carried by the insurer, the general rule is that the premiums in such case cannot be recovered from the company. Bliss, Life Insurance, 750; May, Ins. sec. 567.

Premiums Refused.—Where there was a continuing valid risk up to the time the last premium was tendered and refused, then the premiums previously paid cannot be recovered back as for money had and received. An insurer cannot be required to carry a risk without compensation and is entitled to pay for such risk. Continental Ins. Co. v. Houser, 111 Ind. 266; May, Ins. secs. 568, 569.

Fraudulent Act.—If a wife knowingly participates in the fraudulent act of an agent of an insurance company and attempts to evade the company's rules in taking out insurance on a husband's life without his knowledge, but at the solicitation of the company's agent, she cannot recover the premiums paid. Fisher v. Met. Life Ins. Co. (Mass. S. J. C.), 35 N. E. Rep. 849.

When Premiums May be Recovered.—If a life insurance company wrongfully refuse to receive a premium when it is due, thereby terminating the contract, the assured has a right to treat the policy as at an end, and recover all the moneys he has paid under it. Suess v. Imperial Life Ins. Co. (Kan. C. A.), 2 Mo. App. R. 830. The New York Supreme Court, in case of Daugherty v. Metropolitan Life Ins. Co., 38 N. Y. Sup. 258, decided that where the policy of insurance provided that it should be void if the assured be in poor health at the time of delivery, on refusal of the company to pay the loss on that ground the premiums paid thereon should be returned to plaintiff. The insurer could not treat the policy as void *ab initio* and retain the premiums paid thereon. An agent's knowledge is the knowledge of the company in matters pertaining to an application for insurance. Thus where an agent solicited a girl to insure her father's life for her benefit, and she signed her father's name to the application on the agent's representation that she had authority to do so. The agent then certified that he had seen and examined the father and recommended his acceptance. A policy was issued to her which required all applications to be signed by the party proposed for insurance as a condition precedent to its validity. The court, in an action to recover the premiums, held that the agent's knowledge was the knowledge of the company, and since the policy was void from the beginning, and known by the company to be so, plaintiff was entitled to recover back the money paid by her in premiums. Fulton v. Metropolitan Life Insurance Company (N. Y. S. C.), 21 N. Y. Supp. 470, 50 N. Y. State Rep. 887.

In a subsequent action, the record showed that plaintiff stated to the secretary of the company that she understood that the policy was of no effect because of the failure to obtain the consent of her father to the procuring of such insurance, and that she wanted the premiums returned. The secretary replied that it was void, but that the company might waive its objection to the validity of the policy, if plaintiff would obtain her father's consent to the policy, and a physician's certificate as to his health. Instead of doing this she brought suit for the premiums. The court held that they both regarded and treated the policy as void, and neither could revive it without the consent of the other, and that she was entitled to recover the premium under the common count in *assumpsit*. Fulton v. Met. Ins. Co. (N. Y. City C. P.), 23 N. Y. Supp. 598, N. Y. State Rep. 172. If a fire policy be issued to one having no insurable interest in the property covered, the agreement to pay the premiums is without consideration, and the company has no right in equity and good conscience to retain them. The holder of the void policy may bring an action for money had and received, and if the statute of limitation has not run against him, he may recover premiums paid. New Holland Furniture Co. v. Farmers' Mut. Fire Ins. Co. (Pa. S. C.), 48 Leg. Int. 527, 22 Atl. Rep. 923. Where an insurance policy on lumber contained a warranty that a continuous clear space of 150 feet existed and should be maintained between the saw-mill and the lumber, and such warranty is untrue when made, and when the property was destroyed by fire communicated by the sawmill within the space provided for in the warranty, no risk ever attached on the policy, and in the absence of any intentional fraud by the policy holder, he is entitled to a return of the premiums paid. Jones v. Ins. Co. N. A. (Tenn. S. C.), 18 S. W. Rep. 260.

Rescission of Contract.—Where an insurance company, without the knowledge and consent of plaintiff, changed the plan of insurance contracted for in his policy, notwithstanding an act of legislature enabling the company to do so, plaintiff was held to have the right to rescind the contract and recover back the premiums paid thereon. People's Mut. Ins. Co. v. Bricken (Ky. C. A.), 17 S. W. Rep. 625.

Breach of Court.—In an action to recover premiums, it was shown that plaintiff failed to pay a premium on a policy taken out on the life of his father when it became due, and defendant declared the policy forfeited. Plaintiff applied for reinstatement, and offered to show that the assured was alive and in good health, as provided for in one of the by-laws. The notice to plaintiff also recited "that no payment will be received or reinstatement made after the last day of payment, except on the condition that the insured is alive and in good health." Reinstatement was refused on the ground that plaintiff's father was beyond the age at which it would write insurance. The court held that the refusal to reinstate constituted a breach of its contract with the plaintiff, and the latter was entitled to recover the amount paid thereon, with interest. Lovick v. Provident Life Assn. (N. Car. S. C.), S. W. Rep. 506, 21 Ins. Law J. 332.

Repudiated Contract.—Where it was shown that plaintiff had paid the insurance premiums for the first and second years, his contract with the agent concerning rebates not having been repudiated by the company until after the premium for the third year was tendered. Held, that an instruction that he was entitled to recover the whole of the premiums paid by him, with interest, was not erroneous, notwithstanding the fact that he had received the benefit of insurance for those years. Tompson v. New York Life Ins. Co. (Oreg. S. C.), 28 Pac. Rep. 623.

Indianapolis, Ind. R. D. FISHER.

CORRESPONDENCE.

ERRORS IN HEAD NOTES.

To the Editor of the Central Law Journal:

Being a regular and close reader of the JOURNAL, I have on several occasions been struck with startling differences between the head notes, of cases reported therein, and the language of the judges delivering the opinions of the courts. Having seen it again, I venture to call your attention to this one, hoping that you will receive the notice in the same spirit in which it

is given. In the head note to the case of Wheeler Banking Co. v. Holden, 47 Cent. L. J., p. 34, it is said: "There" is "a novation releasing H, etc., where etc." Now, according to my reading of the case, the court distinctly decided that there was no novation, and reversed the lower court for finding a novation in the case. The language of the court, in summing up its opinion at the bottom of p. 36, is "unless the claim of the Banking Co. against the Milling Co. (H referred to in head note) was released by authority of the Banking Co., it was not released, and remains a valid and enforceable claim. But the claim was not released by the authority of the Banking Co.; consequently it was not released, and is valid and enforceable. The Smelting Co. was not charged, and the Milling Co. was not discharged; therefore there was no novation."

Richmond, Va. GEO. AINSLIE.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCOUNT STATED—Correction.—An account stated can be opened for correction only upon the ground of fraud, mistake, accident, omission or undue advantage, and the burden rests upon the party seeking to open the account.—MONTGOMERY v. FRITZ, N. Dak., 75 N. W. Rep. 266.

2. ADMINISTRATOR'S SALE—Parties.—Under Burns' Rev. St. 1894, § 2491 (Rev. St. 1881, § 2338), declaring who are necessary parties to an administrator's sale to pay debts, the widow and heirs of the deceased are necessary defendants; and in a proceeding to sell the land of an intestate to pay debts, where the widow of a deceased son and heir is made a party, it is unnecessary, to the validity of the sale, that she should also be made a party as administratrix of her husband's estate.—WOOD v. WOOD, Ind., 50 N. E. Rep. 573.

3. APPEAL—Decision—Abstract Questions.—An appellate court will not decide abstract questions, the decision of which cannot possibly benefit either party to the litigation on the merits, but will dismiss an appeal whenever it appears that no decision which it can render will aid the appellant on the merits.—IN RE KAEPPLER, N. Dak., 75 N. W. Rep. 253.

4. ASSIGNMENT BY BUILDING AND LOAN ASSOCIATION.—The directors of a building and loan association have no authority, either under the general assignment statute of Kentucky or at common law, to make a valid assignment for the benefit of creditors, without authority from the shareholders, when the corporation is not in fact insolvent.—POWERS v. BLUE GRASS BLDG. & LOAN ASSN., U. S. C. C., D. (Ky.), 86 Fed. Rep. 705.

5. ASSIGNMENT OF DAY WAGES—Validity.—The fact that an assignor is permitted by his assignee, by orders given for that purpose, to draw wages he assigned, which he immediately turned over to assignee, does not render the assignment fraudulent and void.—DOLAN v. HUGHES, R. I., 40 Atl. Rep. 344.

6. ASSOCIATION—Action Against.—Code, § 14, providing that when two or more persons, associated in any business, transact it under a common name, whether comprising their names or not, the association may be sued by such common name, authorizes an action against the members of an unincorporated side rank of a benevolent order, on a life insurance certificate, in the name in which they did business.—ENDOWMENT RANK OF ORDER OF K. OF P. OF THE WORLD v. POWELL, Colo., 53 Pac. Rep. 285.

7. ATTACHMENT—Abandonment.—An attachment was issued against the property of a partnership in a certain county in a suit against one of the partners, and subsequently a receiver was appointed for the partnership, and the attached property was turned over to the receiver. Held, that the attachment proceedings were not thereby dismissed nor abandoned, and that under Rev. St. 1894, § 931 (Rev. St. 1881, § 919), another order of attachment could be issued to the sheriff of another county, and property of the debtor taken thereunder.—RUNNER v. SCOTT, Ind., 50 N. E. Rep. 479.

8. BANKS AND BANKING—Deposits—Payment of Notes.—A bank holding notes as collateral to be sent to debtor bank for collection, and payable at a certain date, need not have the notes in the hands of collecting bank before the date fixed for payment.—BANK OF MONTREAL v. INGERSON, Iowa, 75 N. W. Rep. 351.

9. BANKS AND BANKING—Deposits in Court.—The liability of a bank for money deposited subject to check is only to the depositor, and, in a suit to establish a trust in a deposit, the depositor is a necessary party.—GREGORY v. MERCHANTS' NAT. BANK, Mass., 50 N. E. Rep. 520.

10. BANKS & BANKING—Directors—Liability for Mismanagement.—Directors of a bank are liable for want of reasonable capacity and care, to all persons damaged thereby; and evidence of their negligence and fraud in the management of its affairs is admissible in an action by a customer claiming to have been so damaged.—WOLF v. SIMMONS, Miss., 23 South. Rep. 586.

11. BILLS AND NOTES—Action on Note—Parties Defendant.—Under Code Civ. Proc. § 383, providing that persons severally liable on the same note may all be included in the same action, an indorser on a negotiable note may be joined as a party defendant in a suit on the note.—LOUSTALOT v. CALKINS, Cal., 53 Pac. Rep. 258.

12. BILLS AND NOTES—Guaranty.—One who was not a party to a note signed the guaranty written on the back of the note: "I guaranty payment. Demand, protest and notice of protest waived." Held, that the guaranty was absolute, and the guarantor could not plead lack of diligence on the part of the payee in collecting from the payor, as a defense.—HOYT v. QUINT, Iowa, 75 N. W. Rep. 342.

13. BILLS AND NOTES—Suretyship.—A surety on a note is released by extension of time of payment, only where the extension is for a definite period and a valuable consideration, done without his consent, and with knowledge on the part of the payee of the suretyship.—VORIS v. SHOTTS, Ind., 50 N. E. Rep. 484.

14. BUILDING AND LOAN ASSOCIATIONS—Forfeiture of Stock.—Under Comp. Laws, §§ 3167, 3177, providing that by-laws of building and loan associations shall be subordinate to the statutes, and that the shares of stock shall be subject to a lien for unpaid installments, which may be enforced in the manner prescribed by the by-laws, a building and loan association has no authority to adopt a by-law providing for the forfeiture, without sale, of the shares of its members, for non-payment of dues and fines.—MUELLER V. MADISON BLDG. & LOAN ASSN., S. Dak., 75 N. W. Rep. 277.

15. BUILDING AND LOAN ASSOCIATIONS—Withdrawal of Stockholders.—The provisions of 8 How. Ann. St. § 3981, subd. 6, prohibiting the stockholders of a building association from withdrawing when their stock is pledged for security, apply only where a stockholder has borrowed from the corporation, and pledged his stock as security, and does not prohibit his withdrawal merely because installments on the stock remain unpaid.—DENNISON V. ALPENA LOAN & BLDG. ASSN., Mich., 75 N. W. Rep. 300.

16. BUILDING ASSOCIATION—Loans.—A bond given by a borrower from a building association, pursuant to its by-law, that "the security shall be real estate, or by the borrowing member assigning his stock in pledge or by giving such bonds in pledge as security as the directory may deem sufficient;" the bond reciting, "I do hereby expressly agree that all money heretofore paid or hereafter to be paid by me into the association on the stock I now hold in the same shall be taken and considered as payment on, and in liquidation of, this bond,"—operates as an express appropriation of payments on the stock in liquidation of the loan, and not as a mere agreement to appropriate.—YORK TRUST, REAL ESTATE & DEPOSIT CO. V. GALLATIN, Penn., 40 Atl. Rep. 317.

17. CARRIERS OF GOODS—Carriers—Liability as Warehousemen—Removal of Goods—Reasonable Time—Notice to Consignee—Knowledge of Agent—Bill of Lading—Limiting Liability.—A railroad company is not required to give notice to consignee of the arrival of the goods, but he must look out for their arrival, and remove them from the warehouse within a reasonable time after arrival, and, if he does not after such time, the company is liable only as warehouseman, not as carrier. The consignee is not entitled to a reasonable time to get knowledge of arrival and another reasonable time for removal.—BERRY V. WEST VIRGINIA & P. R. CO., W. Va., 30 S. E. Rep. 143.

18. CARRIERS OF GOODS—Liability for Loss.—Where goods delivered for shipment to a common carrier were, while in its custody at the point of shipment, seized by an officer on legal process against a third party, without fault or connivance of the carrier, and detained by such officer in the freight house, but in his custody, during which time they were stolen, the carrier, having given prompt notice of the seizure to the consignee, is excused from liability therefor on the bill of lading.—INDIANA, I. & I. RY. CO. V. DOREMEYER, Ind., 50 N. E. Rep. 497.

19. CARRIERS OF GOODS—Rights of Consignee.—In the absence of notice to a carrier of the existence of a different relation, a consignee must be treated as the owner of the goods, with authority to control them in transit.—TEBBS V. CLEVELAND, C., C. & ST. L. RY. CO., Ind., 50 N. E. Rep. 486.

20. CARRIERS OF PASSENGERS—Right to Limit Tickets.—A railroad company may limit the use of a ticket sold by its agents to one day from date of sale, where it provides for its redemption if the passenger was unable to commence his journey when expected.—ILLINOIS CENT. R. CO. V. MARLETT, Miss., 23 South. Rep. 583.

21. CHATTEL MORTGAGE—Agister's Lien — Priority.—The lien of an agister, under section 5486, Comp. Laws, is inferior to that of the holder of a mortgage executed and filed before the lien of the agister attached.—FIRST NAT. BANK OF MANDAN V. SCOTT, N. Dak., 75 N. W. Rep. 254.

22. CHATTEL MORTGAGES—Assignment of Mortgaged Property.—Where property covered by a chattel mortgage was transferred by the owner to a trustee for the benefit of creditors, and the mortgagee accepted a portion of the mortgage debt out of the general fund of the estate from such trustee, who was unaware of the mortgage, in order to maintain an action to foreclose the mortgage the mortgagee must repay the amount received from the trustee.—M. RUMLEY CO. V. MOORE, Ind., 50 N. E. Rep. 574.

23. CHATTEL MORTGAGE—Removal of Goods.—Where a mortgage is executed in another State on property therein situated, the mortgagor and mortgagee being domiciled therein, and such mortgage is filed in accordance with the laws of such State, the mortgagee can claim the protection of such laws in another State to which the property is removed without refiling the mortgage in such State, unless the statutes thereof expressly require it to be there refiled.—WILSON V. RUSTAD, N. Dak., 75 N. W. Rep. 260.

24. CHATTEL MORTGAGE—Sufficiency of Description.—A description in a chattel mortgage that fails to state where the mortgagor or mortgagee resides, in what State or county the property is located, or in what county the mortgage is recorded, is of itself insufficient.—WILLSON V. NICHOLS, SHEPARD & CO., Kan., 53 Pac. Rep. 185.

25. CONFLICT OF LAWS—Express Company—Contract.—Intention that contract made in Illinois by an express company for shipment from there to Boston should be governed by the law of New York is not shown by the facts that it was a joint-stock company organized under its laws, that the route was through it, and that one of the provisions of the printed blank on which was the contract was valid under its law, but not under that of Illinois.—BROCKWAY V. AMERICAN EXP. CO., Mass., 50 N. E. Rep. 626.

26. CONFLICT OF LAWS—Usury.—When a citizen of North Carolina borrows money of a Virginia corporation, promising to repay the principal sum at the home office in Virginia, the question whether the contract is usurious must be determined by the Virginia law, though the loan is secured by a mortgage on North Carolina lands.—BROWER V. LIFE INS. CO. OF VIRGINIA, U. S. C. C., W. D. (N. Car.), 86 Fed. Rep. 748.

27. CONSTITUTIONAL LAW—Indictments—Description of Offense.—Laws 1890, ch. 429, provides that, "in any indictment for the unlawful sale of spirituous liquors, it shall not be necessary to specify the particular variety," but defendant, on application, before trial, may obtain a statement of the particular variety expected to be proved. Held, that this section is not contrary to the declaration of rights of this State, or the fourteenth amendment of the United States constitution, giving an accused the right to be informed of the accusation against him, and does not deprive him of his liberty without due process of law.—KIEFER V. STATE, Md., 40 Atl. Rep. 377.

28. CONTRACT — Cancellation — Fraud. — Where the owner of a patent right exhibits a model, and states that the patent which he owns covers the machine exhibited, and, on the strength of that representation, sells the right to manufacture it, he may be enjoined from selling the notes given for that right, and the notes may be declared null and void, if an important device shown in the model is covered by another patent, and the purchaser cannot, for that reason, manufacture under the right the machine shown him.—MOYLE V. SILBAUGH, Iowa, 75 N. W. Rep. 362.

29. CONTRACT—Construction—Stipulation for Arbitration.—A stipulation in a contract provided that, if any difference should arise between the parties, it should be submitted to arbitration. Held, that the word "difference" meant "disagreement," and the mere failure to pay a sum due under the contract was not a disagreement requiring arbitration before suit brought.—FRAVERT V. FESLER, Colo., 53 Pac. Rep. 288.

30. CONTRACT—Damages — Cotton Futures. — A contract for the purchase and sale of "cotton futures" is a

gaming contract, and therefore illegal and contrary to public policy. This being so, neither such a contract, nor the loss or gain resulting therefrom, can be invoked to measure the damages sustained by a party thereto in consequence of the failure or refusal of a bank to comply with its agreement to advance to him money which he intended to use as a margin in conducting a speculation in such futures.—MOSS v. EXCHANGE BANK OF MACON, Ga., 30 S. E. Rep. 267.

31. CONTRACT — Gaming Contracts — Dealing in Futures.—A contract for the future delivery of cotton, made merely to speculate in differences on the rise and fall of the price without any intention to deliver or receive cotton, is void as a gaming contract, not only under Code Ga. § 3671, but also under the general law as announced by the Supreme Court of the United States. — WALDRON v. JOHNSTON, U. S. C. C., S. D. (Ga.), 86 Fed. Rep. 757.

32. CONTRACT—Public Policy.—A contract which contains a stipulation to the effect that the obligor guaranties the trade of his laborers and lessees to the tenant of his storehouse, so far as he is able to control the same, is not an agreement to coerce the laborers and lessees to purchase goods from the proprietors of the store; hence such a contract is not *contra bonos mores*.—DIONNE v. NEW IBERIA REFINING & PLANTING ASSN., La., 23 South. Rep. 624.

33. CORPORATION — Domicile — Principal Office. — Where the place of the chief office of a corporation is not designated by its charter, vote of its stockholders, or resolution of its directors, it is where its stockholders and directors usually meet, where it elects its officers, and conducts its financial operations.—FRICK CO. v. NORFOLK & O. V. R. CO., U. S. C. C. of App., Fourth Circuit, 86 Fed. Rep. 725.

34. CORPORATION—Foreign Corporations.—Contracts of a foreign corporation doing business in Colorado are not invalidated, and its capacity to sue thereon is not affected, by failure to comply with Gen. St. §§ 261, 262, requiring such a corporation to file a copy of its charter and of the law under which it was organized with the secretary of state, and providing that a failure to do so shall render the officers and stockholders individually liable on its contracts.—HELVETIA SWISS FIRE INS. CO. v. EDWARD P. ALLIS CO., Colo., 53 Pac. Rep. 242.

35. CORPORATION—Foreign Corporations—Certificate to Do Business.—Under Laws N. Y. 1892, ch. 687, § 15, providing that "no foreign stock corporation doing business in the State without such certificate [of authority to do business] shall maintain any action in this State upon any contract made by it in this State until it shall have procured such certificate," the remedy is merely suspended until such time as the certificate is procured.—SIMPLEX DAIRY CO. v. COLE, U. S. C. C., S. D. (N. Y.), 86 Fed. Rep. 739.

36. CORPORATION — Insolvent Corporation — Lien of Judgment Creditors. — When a corporation becomes insolvent, and a court of equity has, on the filing of a bill by the proper parties, seized the property and appointed a receiver, a creditor who obtains a judgment at law after such bill is filed, and receiver appointed, does not thereby acquire a legal or equitable lien on the property not covered by a mortgage.—MERCANTILE TRUST CO. v. SOUTHERN STATES LAND & TIMBER CO., U. S. C. C. of App., Fifth Circuit, 86 Fed. Rep. 711.

37. CORPORATION—Right to Inspect Stock Books.—Where plaintiff sought the right to inspect the stock book of a corporation, which, by its answer, tendered him such right, and also tendered all the costs of the suit to date, his failure to dismiss the suit, where no actual damages had resulted, warrants the taxing of costs against him after the tender, though he is entitled to nominal damages.—BOARDMAN v. MARSHALLTOWN GROCERY CO., Iowa, 75 N. W. Rep. 843.

38. CORPORATION—Sale of Assets.—A corporation in fact insolvent, though its directors in good faith believed its assets sufficient to pay its debts, sold its property to the defendants, who gave in part payment a non-negotiable note to two of the directors, who, by agreement with the corporation, assigned it to a creditor of the company, in payment of a corporate debt for which they were sureties. Held, that where the property was in the possession of the corporation at time of the sale, and not subject to any liens, and was sold for full value, such sale and transfer was valid.—CLAPP v. ALLEN, Ind., 50 N. E. Rep. 587.

39. COUNTIES—Powers—Taxation.—A county, being a corporation created by and existing under the laws of this State, can exercise only such powers as are conferred on it by law; and when it undertakes, through its constituted authorities, to exercise the power of taxation in any given manner, a clear and manifest legal right to do so must appear.—ALBANY BOTTLING CO. v. WATSON, Ga., 30 S. E. Rep. 270.

40. CRIMINAL EVIDENCE—Confession. — A confession obtained by a deputy sheriff, under duress, is altogether inadmissible as evidence against an accused person.—STATE v. ALBERT, La., 23 South. Rep. 609.

41. CRIMINAL EVIDENCE—Confessions.—The rule of law requires that the confession of an accused person, sought to be admitted to the jury, shall have been made voluntarily, without the appliances of hope, menace, or fear by any other person. And whether it was so made or not is to be determined upon consideration, among other things, of the circumstances under which it was made.—STATE v. AUGUSTE, La., 23 South. Rep. 612.

42. CRIMINAL EVIDENCE—Murder—Confessions.—One in jail, charged with murder, asked the sheriff for an interview with T, also in the jail, charged with the same crime, and he, after concealing deputies over the cell of T, where they could hear the conversation, took him to said cell, ostensibly as a favor, first walking him around the corridor to show him that no one was there. The sheriff also, at his request, took a letter from him to T, promising to deliver it, but retained it. Held, that the letter and the testimony of the deputies and T as to his conversation with T, amounting practically to a confession, were admissible against him.—COMMONWEALTH v. GOODWIN, Penn., 40 Atl. Rep. 412.

43. CRIMINAL LAW—Arson—Ownership.—Under Pen. Code, § 452 (providing that, to constitute arson, it is unnecessary that a person other than the accused should have owned the building, but, if any part thereof was actually occupied by another, it is sufficient), where it is alleged and proved that the building burned was owned by one, and occupied by others, a conviction will be sustained, though there was no evidence that accused was not licensed by the owner to burn it.—PEOPLE v. FONG HONG, Cal., 53 Pac. Rep. 265.

44. DECEIT—Sales of Stock.—Mere expressions of opinion by a promoter of a corporation as to the value of its stock as an investment, which would naturally be based largely on the success of a certain patent, will not sustain an action of deceit brought by a purchaser of such stock.—LYNCH v. MURPHY, Mass., 50 N. E. Rep. 623.

45. DEED—Acknowledgments—Officer of Corporation as Notary.—An acknowledgment of a mortgage, taken by a notary who was a stockholder and officer in the corporation which was the mortgagee, is void, both irrespective of statute and under Burns' Rev. St. 1894, § 8041 (Horner's Rev. St. 1897, § 5966), prohibiting an officer in a corporation from acting as notary in the business of the corporation.—KOTHE v. KRAG-REYNOLDS CO., Ind., 50 N. E. Rep. 594.

46. DEED—Equitable Title.—Where the grantee in an unrecorded deed sells the land to another, and for the purpose of putting the title in the purchaser without the expense of having the old deed recorded destroys such deed, and procures to be executed to the purchaser a deed directly from the original grantor to the purchaser, no legal title vests in such purchaser, but only an equitable interest, the grantor in such deed having no legal title to convey. A court of equity, however, will compel the holder of the legal title to

convey it to such purchaser.—RUSSELL v. MEYER, N. Dak., 75 N. W. Rep. 262.

47. DEED—Incapacity—Undue Influence.—A grantor in a deed may be extremely old, his understanding, memory and mind enfeebled and weakened by age, and his action occasionally strange and eccentric, and he may not be able to transact many affairs of life, yet, if age has not rendered him imbecile, so that he does not know the nature and effect of the deed, this does not invalidate the deed. If he be capable at the time to know the nature, character and effect of the particular act, that is sufficient to sustain it.—DELAPLAIN v. GRUBB, W. Va., 30 S. E. Rep. 201.

48. DEED—Purchase Price.—An agreement, by the grantee in a deed conveying overflowed land, to pay, as part consideration, a certain sum yearly per acre, provided the grantor kept it pumped below a certain height, but with no corresponding duty on the grantor's part to pump said land, is not *nudum pactum*, where the deed expressly declared that the grantee's agreement to pay as set forth was a part of the consideration moving the grantor to its execution.—VAN LOBEN SELS v. BUNNELL, Cal., 53 Pac. Rep. 266.

49. DEED—Tenants in Common.—A deed conveying land to a certain person "and her children," where there were children *in esse*, vests a fee in such person and her children as tenants in common, under Code, § 2441.—BRABHAM v. DAY, Miss., 28 South. Rep. 578.

50. DOWER—Election.—The inference of an election by a widow to take the homestead in lieu of dower, arising from her continuous occupancy of the property for more than 10 years after her husband's death, is overcome by proof of her receiving the rents from, and paying taxes and costs of improvements on, one-third of the property, and asserting her right thereto in a suit brought by the guardian of her husband's heirs.—WOLD v. BERKHOLTZ, Iowa, 75 N. W. Rep. 329.

51. EASEMENT OF LIGHT AND AIR—Creation.—A building on a lot adjoining a court had five windows opening on it. The owner devised the property to his widow, then to his son, and expressed a wish that the family establishment continue, as nearly as possible, unchanged, but made no disposition of the fee in the court. Held, that whatever easement of light and air extended over the court did not apply to subdivisions of the lot on which the house had not rested.—BAKER v. WILLARD, Mass., 50 N. E. Rep. 620.

52. ELECTIONS—Illegal Ballots.—Under Pol. Code, § 1215, providing that no voter shall place any mark upon his ballot by which it may afterwards be identified as the one voted by him, a mark upon a ballot, having no lawful right there, and that might serve as an identifying mark, vitiates the ballot.—LAUER v. ESTES, Cal., 53 Pac. Rep. 262.

53. ELECTIONS—Qualification of Voters—Domicile.—An unmarried steamship clerk, employed as such for over three years, who resides on the steamer, and has no other place of residence during that time, acquires no voting domicile at the steamer's home port.—HOWARD v. SKINNER, Md., 40 Atl. Rep. 379.

54. EMINENT DOMAIN—Damages.—One whose lands are taken under eminent domain is entitled to interest on damages assessed as of the day of the taking, though he refuses to yield possession till compelled.—IMBESCHEID v. OLD COLONY R. CO., Mass., 50 N. E. Rep. 609.

55. ESTOPPEL.—When a party, with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all material circumstances of the case, freely and advisedly does anything which amounts to the recognition of a transaction, or acts in a manner inconsistent with its repudiation, or freely and advisedly abstains for a considerable lapse of time from impeaching it, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity.—MANN v. PECK, W. Va., 30 S. E. Rep. 206.

56. ESTOPPEL—Pleading—Inconsistent Causes.—One is not estopped to assert an interest in a mining claim by reason of having filed an adverse claim under another location, where the other co-owner has not acted on it.—HULST v. DOERSTLER, S. Dak., 75 N. W. Rep. 270.

57. EVIDENCE—Best and Secondary.—It is competent in an action for the conversion of wheat by defendant to prove the contents of entries showing amount of grain purchased, the grade, price and persons from whom purchased, made by the agent of the defendant at the time of the transaction in the stubs of wheat tickets kept by defendant for that purpose, such entries being the ones from which the agent made up his report to the home office, it appearing that the original entries themselves have been destroyed by defendant.—KELLY v. CARGILL ELEVATOR CO., N. Dak., 75 N. W. Rep. 264.

58. EVIDENCE—False Testimony—Attempt to Induce.—As bearing on the honesty and justice of the defense, plaintiff may show that defendant, before a former trial of the case, attempted to induce persons to appear as witnesses, and testify falsely; and this though he is defending as executor, and is not a witness.—MCHUGH v. MCHUGH, Penn., 40 Atl. Rep. 410.

59. EVIDENCE—Parol Testimony.—Parol testimony is admissible to show a bill of sale, absolute in form, was executed in trust or as security.—RAPHAEL v. MULLEN, Mass., 50 N. E. Rep. 515.

60. FRAUDULENT CONVEYANCES—Liability of Grantee.—One to whom a conveyance is made in fraud of the insolvent laws cannot escape liability to the assignee in insolvency by depositing the money in another jurisdiction.—CUNNINGHAM v. SEAVEY, Mass., 50 N. E. Rep. 545.

61. GARNISHMENT—Salary of City Officer.—The salary of an officer of a city is not subject to garnishment, under Sess. Laws 1891, p. 234, making municipal corporations subject to garnishment, on the ground that public policy demands the best service of public officers, which it is presumed would be impaired thereby.—TROY LAUND. & MACH. CO. v. CITY OF DENVER, Colo., 53 Pac. Rep. 256.

62. HOMESTEAD — Widow's Distributive Share.—A widow, by taking a distributive share in her husband's estate, devests her homestead right.—BENJAMIN v. DOERSCHER, Iowa, 75 N. W. Rep. 330.

63. INJUNCTION—Opening Streets.—A tenant for life has the immediate freehold, and therefore the sole right to hold, use, and enjoy, and may sue out an injunction to restrain a town from opening streets and alleys through his premises, against his consent, without first having the same lawfully taken and condemned, and compensation to such person ascertained in the manner prescribed by law.—JARVIS v. TOWN OF GRAFTON, W. Va., 30 S. E. Rep. 178.

64. INJUNCTION—Restraining Trespass.—As a general rule, an injunction should not be granted to restrain a mere trespass to real property, when the injury complained of is not destructive of the substance of the inheritance,—of that which gives it chief value,—or is not irreparable, but is susceptible of complete pecuniary compensation, and for which the party may obtain adequate satisfaction in the law courts; and in no such case should it be granted in the absence of an allegation of the insolvency of the defendant.—LAZZELL v. GARLOW, W. Va., 30 S. E. Rep. 171.

65. INSURANCE—Violation of Conditions—Mortgages.—Where a fire insurance policy is rendered void by reason of a violation of its provisions, it is not revived by attaching thereto an agreement for the benefit of a mortgagee, without a new consideration therefor.—BALDWIN v. GERMAN INS. CO. OF FREEPORT, ILL., Iowa, 75 N. W. Rep. 326.

66. INTEREST—Compound Interest.—Interest on interest cannot be recovered simply on the strength of the demand.—LEWIN v. FOLSOM, Mass., 50 N. E. Rep. 523.

67. INTOXICATING LIQUOR—Civil Damage Laws—Joint Tort-feasors.—Under 3 How. St. § 2283c3, making all

who contribute by sales of liquor to an intoxication jointly and severally liable for injuries resulting therefrom, different liquor sellers who, on the same day, sell to the same person intoxicants, which cause separate and distinct intoxications, resulting in injuries to others, are not joint tort-feasors, and hence a discharge of one does not release all.—JEWELL v. WELCH, Mich., 75 N. W. Rep. 283.

68. JUDGMENT—Foreign Judgments—Stockholders.—The mere opinion of the highest court of one State that the statutory liability of stockholders for corporate debts is a contractual one, on which an action may be brought in another State, is not a judgment, to which full faith and credit must be given, under the federal constitution, so as to compel the courts of the latter State to allow an action to be brought to enforce the same.—HANCOCK NAT. BANK v. FARNUM, R. I., 40 Atl. Rep. 342.

69. JUDGMENT BY DEFAULT—Vacating.—A party seeking relief in equity from a judgment taken against him by default must exhibit a defense to the action, and also show that the rendition of such judgment was not due to his failure to take such proper steps for his own protection as an adequate foresight of consequences would naturally suggest.—CLELAND v. HAMILTON LOAN & TRUST CO., Neb., 75 N. W. Rep. 239.

70. LANDLORD AND TENANT—Estoppel to Deny.—The tenant who took a lease under seal, signed by both parties, cannot, as long as he remains in possession, deny his landlord's title, even though such tenant was in possession when the lease made, and he claims that he was at that time himself the owner. In order to remove the estoppel, he must surrender the possession. Conceding that he may, without surrendering possession, avoid the estoppel for fraud or mistake, held, the evidence does not warrant a verdict in his favor on any such ground.—SAGE v. HALVERSEN, Minn., 75 N. W. Rep. 229.

71. LANDLORD AND TENANT — Lease by Life Tenant.—The rights of a lessee of the estate of a life tenant who has sown nothing on the land are entirely extinguished by the death of the lessor, and he becomes liable to the reversioner for subsequent occupation.—CARMAN v. MOSIER, Iowa, 75 N. W. Rep. 323.

72. LIBEL — Actions ex Delicto.—Where one intentionally causes temporal loss to another without justifiable cause and with malicious purpose to inflict it, the natural and proximate damages may be recovered in an action of tort.—HOLLENBECK v. RISTINE, Iowa, 75 N. W. Rep. 355.

73. LIBEL—Words — Actionable Per se.—A letter recited: "We are looking into the doings of this tribe of attorneys. It looks very much as though they put their heads together, and each of them get as much out of the estate as possible. An outside attorney told me a few days ago that M had put a lien on the estate for $1,250 on account of the heirs you represent, and $500 extra to fight the church, making $1,750 for one and the same thing. Outrage!" Held to be libelous *per se*.—MOSNAT v. SNYDER, Iowa, 75 N. W. Rep. 356.

74. MANDAMUS TO JUSTICE—Review.—A district judge having granted and made a writ of *mandamus* against a justice of the peace peremptory, commanding him to grant a writ of injunction against the consummation of an execution sale because the defendant had not been notified of the proceedings antecedent to trial and judgment, same will not be disturbed or inquired into by means of *certiorari* and prohibition, if same appear to have been regular and jurisdictional.—STATE v. GUION, La., 23 South. Rep. 614.

75. MARRIED WOMAN—Covenants of Deed.—Under Rev. St. 1894, § 6963 (Rev. St. 1881, § 5118), providing that a married woman shall be bound by covenants of title in conveyences of her separate real property as if sole, it is not necessary, in an action for breach of covenant of title against a married woman, to allege that the land was her separate real property.—DICKEY v. KALFSBECK, Ind., 50 N. E. Rep. 590.

76. MARRIED WOMAN—Divorced Wife—Tort of Former Husband.—2 How. Ann. St. §§ 6295, 6297, provide that the property of a married woman shall be and remain her estate, and that action may be brought by and against a married woman in relation to her sole property, the same as if she were unmarried. Held, that this statute did not warrant the bringing of an action by a divorced woman against her former husband for a personal tort committed by him while they lived together as husband and wife.—BANDFIELD v. BANDFIELD, Mich., 75 N. W. Rep. 287.

77. MARRIED WOMAN—Lease.—A lease of her lands by a married woman, simply for the purpose of giving the lessee the right to prospect and operate for gas and oil, is not an "incumbrance or conveyance," as contemplated by Burns' Rev. St. 1894, § 6951 (Horner's Rev. St. 1897, § 5116); and hence her husband need not join in its execution.—HEAL v. NIAGARA OIL CO., Ind., 50 N. E. Rep. 482.

78. MARRIED WOMEN—Powers—Judgment.—Pending an appeal by a wife from a judgment against her and her husband on notes given for the price of property bought by the husband, she has no power to consent that a compromise judgment be rendered against her and her husband; and such judgment would not bind her, though she withdrew her appeal, and was present before the court with her husband, giving his consent, and was represented by counsel of her own selection.—MCLEOD v. WILLIAMS, N. Car., 30 S. E. Rep. 129.

79. MASTER AND SERVANT — Liability of Master—Medical Treatment.—A master is not bound to furnish medical attendance to a servant injured in the performance of duty, and is not liable for negligence if he declines a request from the injured servant to be permitted to obtain treatment, or does not obtain or aid him in obtaining same.—DENVER & R. G. CO. v. ILES, Colo., 53 Pac. Rep. 232.

80. MASTER AND SERVANT—Negligence—Railroads.—A railroad company which fails to have modern coupling devices on its freight cars is guilty of continuing negligence, and is liable for injuries incurred in coupling such cars by hand.—GREENLEE v. SOUTHERN RY. CO., N. Car., 30 S. E. Rep. 115.

81. MASTER AND SERVANT—Negligence—Respondeat Superior.—The doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of the wrong at the time and in respect to the very transaction out of which the injury arose; and a servant employed and paid by one person may nevertheless be, *ad hoc*, the servant of another in a particular transaction, even when the general employer is interested in the work.—HIGGINS v. WESTERN UNION TEL. CO., N. Y., 50 N. E. Rep. 500.

82. MECHANIC'S LIEN—Property Subject.—An oil well, together with the derrick engine, boiler pumps, piping and appliances attached thereto, is a "structure," within Burns' Rev. St. 1894, § 7255, giving to material-men a lien on a "house, mill, or other structure," and is subject to a lien of one who furnishes gas for fuel used in drilling it.—HASKELL v. GALLAGHER, Ind., 50 N. E. Rep. 485.

83. MECHANICS' LIENS—Property Subject.—Pub. St. ch. 191, § 1, providing that any person to whom a debt is due for labor performed on a building on real estate shall have a lien, does not apply to a house held by a town for public-school purposes.—LESSARD v. TOWN OF REVERE, Mass., 50 N. E. Rep. 533.

84. MECHANICS' LIENS—Waiver by Contract.—Right of subcontractors to lien is not taken away by contract of principal contractor stipulating that he shall "execute and deliver a full and complete release of all liens whatsoever" to any single lot on being paid the proportioned part of his contract price, and binding him not to file any lien himself, and that he "will not suffer any lien on the said 65 buildings that can in any manner impair the lien of the 65 mortgages executed in

favor of the G Co."—GORDON v. NORTON, Penn., 40 Atl. Rep. 312.

85. MORTGAGES—Assignment — Discharge.—A mortgagee assigned and delivered the mortgage and note to plaintiff. The mortgage was recorded, but the assignment was not. One about to purchase the premises discovered the mortgage of record unsatisfied, but, on the mortgagor's assurance that it had been paid, took a conveyance and paid the price, and a discharge executed by the original mortgagee was afterwards recorded. Held, that the record of the mortgage was notice of a lien, and the purchaser was put on inquiry as to the ownership of said note and mortgage, and is not protected by such discharge as against plaintiff.—BABCOCK v. YOUNG, Mich., 75 N. W. Rep. 802.

86. MORTGAGES—Assignment—Release.—A transfer by a mortgagee of the mortgage and the notes secured thereby is a transfer of all his rights therein, and a subsequent collection by him of two of the three notes secured by the mortgage does not authorize him to take other notes in settlement of the amount unpaid, or release the mortgage.—FRANKLIN SAV. BANK v. COLBY, Iowa, 75 N. W. Rep. 346.

87. MORTGAGES—Marshaling Assets.—Where a mortgage is given on part of land subject to judgment liens which could be fully satisfied from the remainder of the land, which was afterwards conveyed by trust deed for the benefit of one who thereafter bought up the judgment liens, the right of the mortgagee to require the judgment liens to be satisfied from the remainder will continue and be protected as against the beneficiary of the trust deed.—BANK OF COMMERCE OF EVANSVILLE v. FIRST NAT. BANK OF EVANSVILLE, Ind., 50 N. E. Rep. 566.

88. MORTGAGES—Merger — Equity of Redemption.—Ordinarily, when one having a mortgage on real estate becomes the owner of the fee, the former estate is merged in the latter. But the mortgagee may, in such case, keep his mortgage alive when it is essential to his security against an intervening title. If there was no expression of his intention in relation to the matter at the time he acquired the equity of redemption it will be presumed, in the absence of circumstances indicating a contrary purpose, that he intended to do that which would prove most advantageous to himself.—WYATT-BULLARD LUMBER CO. v. BOURKE, Neb., 75 N. W. Rep. 241.

89. MUNICIPAL CORPORATIONS—Change of Grade.—In a suit by a landowner against a municipal corporation for damages alleged to have resulted from grading its streets in such manner as to leave the land inaccessible by ready approach from the street, it was error for the court to charge that if "the plaintiff could still have met the change in the grade of the city's streets by merely changing the grade of her own street, and, in consequence, the market value of the property was not decreased, then the plaintiff in this case would not be entitled to recover anything from the city."—ESTES v. MAYOR, ETC. OF MACON, Ga., 30 S. E. Rep. 246.

90. MUNICIPAL CORPORATIONS—Licenses—Bonds.—A tradesman suing a municipality for wrongfully refusing him a license required by an ordinance also providing that no application for a license shall be considered unless accompanied by a prescribed bond, approved by the council, must, in addition to his application, its approval or wrongful rejection by the proper officer, and the payment of the license fee, show that such bond was tendered and approved.—IRVING v. CITY OF HIGHLANDS, Colo., 53 Pac. Rep. 234.

91. MUNICIPAL CORPORATIONS — Power — Closing Streets.—An ordinance closing a street in Chicago at the place where it was crossed by a railroad track was not an exercise of the police power of the city, and, if property is injured by such closing of a street, the owner is entitled to damages.—CITY OF CHICAGO v. BAKER, U. S. C. C. of App., Seventh Circuit, 86 Fed. Rep. 753.

92. MUNICIPAL CORPORATIONS—Violation of Ordinance—Costs—Prohibition.—Violation of the public ordinances of cities, towns and villages are strictly criminal in nature, being offenses against the public, and not merely private wrongs.—CITY OF CHARLESTON v. BELLER, W. Va., 30 S. E. Rep. 153.

93. NEGLIGENCE—Defective Fence.—The person only whose duty it is to maintain a division fence is liable for an injury sustained by a third person by the falling thereof.—QUINN v. CRIMMINGS, Mass., 50 N. E. Rep. 624.

94. NEGLIGENCE—Electric Wires.—A municipality is bound to exercise careful supervision of electric wires over it streets, and is liable for injuries resulting from neglect of such duty, notwithstanding the liability of the owner.—MOONEY v. BOROUGH OF LUZERNE, Penn., 40 Atl. Rep. 311.

95. NEW TRIAL—Newly-discovered Evidence.—A petition for new trial on the ground of newly-discovered evidence is not demurrable because it contains merely a general averment of diligent search and inquiry, and inability to obtain the evidence set out, where the specific acts done are not called for.—SCOTT v. HAWK, Iowa, 75 N. W. Rep. 368.

96. NUISANCE — License — Indictment. — A license merely to conduct a rendering factory does not authorize it to be conducted in a negligent and improper manner, which of itself makes a nuisance.—STATE v. BARNES, R. I., 40 Atl. Rep. 374.

97. OFFICE AND OFFICERS—Deposit of Public Money.—Act April 17, 1889, § 2, prohibiting the loaning, with or without interest, by any public official, of any money in his possession or control by virtue of his office, was not intended to prohibit the deposit of money in banks for safe-keeping, but the use of public money by the officer for his own gain by way of loans.—DAVIS v. DUNLEVY, Colo., 53 Pac. Rep. 250.

98. PARTNERSHIP—Assignment for Creditors.—An assignment by a surviving partner of an insolvent firm for an indefinite term, the assignee to have the right to employ servants, and to replenish the stock, and out of the proceeds to pay firm debts, and also the individual debts of the survivor *pro rata*, is a fraud on creditors.—SOUTHERN COMMISSION CO. v. PORTER, N. Car., 30 S. E. Rep. 119.

99. PARTNERSHIP—Claim Against Firm.—A partner who, after dissolution of the firm, converts firm property to his own use, is liable for interest thereon.—AHL v. AHL, Penn., 40 Atl. Rep. 405.

100. PARTNERSHIP — Limitations — Accounting.—In order to subject an action of one partner against his co-partner to the bar of the statute of limitations, it must not only appear that there has been a dissolution of the partnership more than five years before the institution of the suit, but that there were no valid claims of debit or credit against or in favor of the firm paid or received or outstanding within that time.—SMITH v. BROWN, W. Va., 30 S. E. Rep. 160.

101. PRINCIPAL AND SURETY — Bond of Bank Teller—Negligence of Bank Officials.—Negligence of the officers of a bank in failing to examine the books, and to discover the defalcations of the paying teller, does not release the sureties on his bond given for the faithful performance of his duties.—LIEBERMAN v. FIRST NAT. BANK OF WILMINGTON, Del., 40 Atl. Rep. 382.

102. RAILROAD COMPANY — Discrimination.—Under Laws 1891, ch. 320, § 4, providing that no common carrier shall receive from any person any greater compensation than it charges any other person for a like and contemporaneous service, it is unlawful for a railroad company to issue passes, and transport people thereon free of charge.—STATE v. SOUTHERN RY. CO., N. Car., 30 S. E. Rep. 133.

103. RAILROAD COMPANY—Street Railways—Contributory Negligence.—One struck by a street car from behind is guilty of contributory negligence, having walked on the track, knowing that the car was due though frequently looking behind her for it.—GILMARTIN v. LACKAWANNA VAL. RAPID-TRANSIT CO., Pa., 40 Atl. Rep. 322.

104. REAL ESTATE BROKER — Commissions.—One who sells directly at a reduced price property listed with a real estate broker to a purchaser the broker had found, and with whom he was negotiating a sale without having introduced him to his principal, is liable for commissions on the price received.—WILLIAMS v. BISHOP, Colo., 53 Pac. Rep. 239.

105. RECEIVERS — Contempt.—A void order of court may be attacked collaterally, and it is not contempt to disobey it.—STATE v. DISTRICT COURT OF SECOND JUDICIAL DISTRICT, Mont., 53 Pac. Rep. 272.

106. RECEIVERS—Legal Services.—A receiver is under obligation to perform such duties in respect to the trust as any ordinarily competent business man is presumed to be capable of performing. It is only for services requiring special legal skill that he will be allowed counsel fees.—OLSON v. STATE BANK, Minn., 75 N. W. Rep. 378.

107. RES JUDICATA—Estoppel of Tenant.—When a decree is entered reserving the right to any party to further litigate any matter in controversy in the suit, such reservation may be reviewed on appeal by any party prejudiced thereby, and, if no appeal is taken, such reservation becomes *res adjudicata*, and cannot be called in question by any party in any other suit or proceeding.—BODKIN v. ARNOLD, W. Va., 30 S. E. Rep. 154.

108. SALE—Fraud.—Where a vendor is induced to sell goods by fraudulent representations of the vendee concerning his solvency, which goods are thereafter mortgaged for an antecedent debt, and the vendor elects to rescind the sale, the possession of the goods by the mortgagee will not defeat the claims of the vendor.—P. COX SHOE MFG. CO. v. ADAMS, Iowa, 75 N. W. Rep. 316.

109. SALE—Liability of Purchaser.—If, in the attempted peformance of a commutative contract to transport sugar cane from the field to the factory, and pay the purchase price for cane agreed upon, the cane becomes sour and unfit for use, caused by a "freeze" to which the cane was exposed, owing to deficient means of transportation, which the purchaser was bound to furnish, he must bear the loss resulting from the freezing temperature.—DELAHOUSSAYE v. ADELINE SUGAR FACTORY CO., La., 23 South. Rep. 619.

110. SUBROGATION—Sales.—A seller delivered the goods solely on the credit of his salesman, who was induced to lend his credit through fraud of the buyer, and it was agreed that, if the buyer ever paid the seller, the money should be turned over to the guarantor. Held, that the seller had no right in the premises to which the guarantor could be subrogated, on his paying the price.—MOORE v. WATSON, R. I., 40 Atl. Rep. 345.

111. SUBROGATION — Vendor's Lien.—Plaintiff paid a note expressly secured by vendor's lien, under an agreement with the makers that she should hold the note and lien as security. Held, that she was not a mere volunteer, but was entitled to be subrogated to the rights of the vendor, as against subsequent mortgagees taking with notice.—WARFORD v. HANKINS, Ind., 50 N. E. Rep. 468.

112. TAXATION—Exemptions—Schools.—Rev. St. 1881, § 6276, cl. 5, providing that every building used and set apart for educational purposes is exempt from taxation, does not exempt property from taxation, owned by one person, and used by another for a school purpose.—TRAVELERS' INS. CO. v. KENT, Ind., 50 N. E. Rep. 562.

113. TELEGRAPH COMPANY — Damages. — Telegraph companies are not absolute insurers against mistakes in the transmission of message, nor delay in delivery.—POSTAL TEL. CABLE CO. v. BARWISE, Colo., 53 Pac. Rep. 252.

114. TRADE-MARK — Acquisition. — The stamping of letters and figures upon the pieces of machinery going to make up the machines of which they severally form a part is presumably for the purpose of identifying the several parts; and, if it serves also to denote the manufacturer, that is incidental only, and does not create a trade-mark.—DEERING HARVESTER CO. v. WHITMAN & BARNES MFG. CO., U. S. C. C., N. D. (Ohio), 86 Fed. Rep. 764.

115. TRESPASS — Estoppel. — Where a grantor conveyed land by deed containing covenants of general warranty, and subsequently became the owner of adjoining property, he and his privies are estopped by such covenants to claim or exercise a right of way over the land so conveyed.—HODGES v. GOODSPEED, R. I., 40 Atl. Rep. 373.

116. TRUSTS — Construction of Deed. — Where the owner of property conveys the same, except the income, in trust to be conveyed as she might by will direct, with power to the trustees to sell with her consent, the proceeds of the sale to be retained by them or paid over to the grantor, she retains no such interest in the body of the estate as can be applied in satisfaction of after-created debts.—CRAWFORD v. LANGMAID, Mass., 50 N. E. Rep. 606.

117. USURY—Forfeiture.—A debtor seeking to have an usurious element eliminated from the debt must pay the principal and legal rate of interest, and the discovery of usury forfeits only such interest as is in excess of the legal rate.—CHURCHILL v. TURNAGE, N. Car., 30 S. E. Rep. 122.

118. VENDOR AND PURCHASER—Executory Contract—Assignment.—An assignment by the vendee of an executory contract for the sale of real estate held to assign all his interest, including the damages which had accrued to him by reason of the torts of the vendor in wrongfully taking possession and committing waste by removing the buildings.—ABRAHAMSON v. LAMBERSON, Minn., 75 N. W. Rep. 226.

119. VENDOR AND PURCHASER—Notes—Bond for Title. —Where the owner of land has given a bond for title, and taken notes in payment, the hypothecation of the notes by him does not pass the legal title to the land. —MORRISON v. CHAMBERS, N. Car., 30 S. E. Rep. 141.

120. WATER COMPANIES—Unpaid Water Bills.—In the absence of a statute making an unpaid water bill a charge upon the land, a water company cannot refuse to supply water, to one tendering the price in advance, on account of an unpaid bill of a previous occupant of the premises.—TURNER v. REVERE WATER CO., Mass., 50 N. E. Rep. 634.

121. WILL—Defeasible Estate—Death without Issue. —Testator, by a provision of his will, gave a fee absolute in certain property to his grandchildren, though containing no words of inheritance. In the next provision he stated "that the property willed by me to the said grandchildren should be held in common, and, if either of them should depart this life without leaving living issue, then and in that case the survivor or heirs of his body shall inherit all the property and estate devised to both of them." Held, that under the rule in Indiana the latter words referred to a death during the life of the testator, and, both devisees surviving him, each took an absolute estate in fee-simple.—FIRST NAT. BANK OF COVINGTON, KY. v. DE PAUW, U. S. C. C. of App., Seventh Circuit, 86 Fed. Rep. 722.

122. WILLS — Descent and Distribution. — A testator devised a life estate in his property to his children, providing that, upon the death of either of them leaving children, the portion of such deceased child should be given to his children. One of testator's children died, leaving a daughter and son. The son died, leaving a widow and children. Held, that the share of the son would go to his sister, rather than to his widow and children.—BRAGG v. CARTER, Mass., 50 N. E. Rep. 640.

123. WITNESS—Privileged Communications—Appeal—Presumptions.—Statements made in confidence to a fellow member of the Masonic order are not privileged communications, protected from disclosure by a witness.—OWENS v. FRANK, Wyo., 53 Pac. Rep. 282.